

Feb 1910
Mar 7
TRANSCRIPT OF RECORD.

Argued
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910 *3*

No. ~~100~~ 172. *19*

**ISIDOR STRAUS AND NATHAN STRAUS, COMPOSING
THE FIRM OF R. H. MACY & COMPANY, PLAINTIFFS
IN ERROR,**

vs.

AMERICAN PUBLISHERS' ASSOCIATION ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED NOVEMBER 17, 1910.

(22,408.)

(22,408.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 787.

ISIDOR STRAUS AND NATHAN STRAUS, COMPOSING
THE FIRM OF R. H. MACY & COMPANY, PLAINTIFFS
IN ERROR,

vs.

AMERICAN PUBLISHERS' ASSOCIATION ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Page.
Record on appeal to court of appeals.....	1
Statement under Rule 41.....	2
Plaintiff's notice of appeal to court of appeals.....	4
Summons.....	7
Complaint.....	9
Amended answer of American Publishers' Association <i>et al.</i>	28
Exhibit A—Plan to correct some of the evils connected with the cutting of prices on copyright books, adopted February 13, 1901.....	44
B—Plan and amendments referring to fiction, adopted Jan- uary 8, 1902.....	47
C—Plan and amendments referring to fiction, adopted January 8, 1902, and May 27, 1902.....	50
D—Plan and amendments.....	54
E—Plan as amended to March 4, 1903.....	58
F—Plan as amended to January 14, 1904.....	62
G—Plan as amended to April 1, 1904.....	66

Amended answer of Clarence F. Walcott <i>et al.</i>	
Exhibit A—Plan adopted February 13, 1901	
B—Plan and amendments, adopted January 8, 1902	
C—Plan and amendments, adopted January 8, 1902, May 27, 1902	
D—Plan and amendments, adopted January 8, 1902, and May 27, 1902	
E—Plan as amended to March 4, 1903	101
F—Plan as amended to January 14, 1904	105
G—Plan as amended to April 1, 1904	109
H—Reform resolution No. 1	111
I—Reform resolution No. 2	113
Decision	115
Findings of fact	116
Conclusions of law	139
Interlocutory judgment	143
Plaintiffs' requests to find	165
Plaintiffs' exceptions	171
Opinion of Mr. Justice Dowling	173
Order of affirmance	174
Judgment of affirmance	177
Opinion <i>per curiam</i> in appellate division	177
Dissenting opinion of Ingraham, J.	181
Dissenting opinion of McLaughlin, J.	182
Order granting leave to appeal to court of appeals	183
Opinion of court of appeals by Gray, J.	185
Dissenting opinion of Bartlett, J.	190
Judgment on remittitur	192
Referee's report	195
Order confirming referee's report	198
Final judgment	201
Stipulation waiving certification	203
Remittitur from court of appeals	204
Judgment on remittitur	205
Bond on writ of error	207
Petition for writ of error	209
Assignment of errors	212
Citation and service	213
Writ of error	215
Clerk's certificate	

New York Supreme Court,

NEW YORK COUNTY.

ISIDOR STRAUS and NATHAN STRAUS, com-
posing the firm of R. H. MACY & COM-
PANY,

Plaintiffs,

2

against

AMERICAN PUBLISHERS' ASSOCIATION,
George S. Emory, D. Appleton &
Company; American News Company;
Henry B. Barnes, doing business as A.
S. Barnes & Company; Brentano's, Cen-
tury Company, Henry T. Coates and
Edward J. Scott, co-partners, doing busi-
ness under the firm name of H. T. Coates
& Company; Thomas Y. Crowell, E. Os-
borne Crowell, T. Irving Crowell, and J.
Osborne Crowell, co-partners, doing busi-
ness under the firm name of Thomas Y.
Crowell & Company; G. W. Dillingham
Company; Frank H. Dodd, Bleecker Van
Waguen and Robert H. Dodd, co-part-
ners, doing business under the firm name
of Dodd, Mead & Company; Doubleday,
Page & Company; E. P. Dutton & Com-
pany, Funk & Wagnalls Company, Har-
per & Brothers, Henry Holt and Charles
Holt, co-partners, doing business under
the firm name of Henry Holt & Company;
George H. Mifflin, James M. Kay, Henry
A. Houghton, Oscar R. Houghton, Albert
F. Houghton, Lucy H. Valentine, co-part-
ners, doing business under the firm name

3

- 4 of Houghton, Mifflin & Company; McClure, Phillips & Company, Macmillan Company, New Amsterdam Book Company, James Pott and James Pott, Jr., co-partners, doing business under the firm name of James Pott & Company; G. P. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, co-partners, doing business under the firm name of J. F. Taylor & Company; Adolf Wessels, doing business as A. Wessels Company; Clarence E. Walcott, individually and as President of the American Booksellers' Association, a voluntary unincorporated Association; Joseph W. Nichols, individually and as Secretary of the American Booksellers' Association; J. Wilson Hart, individually and as Treasurer of the American Booksellers' Association; Baker & Taylor Company, Fleming H. Revell Company, Fowler & Wells Company, Adolph Mackel and John Ammon, co-partners, doing business under the firm name of Leggat Brothers; William R. Jenkins,
- 5 Defendants.
- 6

STATEMENT UNDER RULE 41.

This action was begun on the 3rd day of December, 1902, by the personal service of the summons and complaint upon the defendants. All the defendants except the Fleming H. Revell Co., which did not appear; the Fowler & Wells Co., which served its answer on December 20th, 1902, and against whom the action has been discontinued and Adolph Mackel and John Ammon, doing

business as Leggat Brothers, against whom this action has been discontinued, demurred to the complaint. The American Publishers' Association and other publishers served their demurrer on the 13th day of December, 1902, and the defendants, American Booksellers' Association and other booksellers served their demurrers on the 10th day of December, 1902. 7

The demurrers to the complaint were sustained at Special Term by Mr. Justice O'Gorman; the interlocutory judgment thereon was reversed by the Appellate Division and the demurrers overruled (85 App. Div., 446), and the Court of Appeals affirmed the judgment of the Appellate Division (177 N. Y., 473), giving the defendants permission to serve answers. In accordance with such permission the defendants, The American Publishers' Association and other publishers served their answer to the complaint on the 16th day of April, 1904, and the defendants, The American Booksellers' Association and other dealers served their answer on the 20th day of April, 1904. 8

A motion was made to require such answers to be made more definite and certain, which was denied at Special Term but granted by the Appellate Division (96 App. Div., 315), and thereupon The American Publishers' Association served an amended answer on the 9th day of September, 1904, and the defendants, The American Booksellers' Association served an amended answer on the 12th day of September, 1904. 9

Plaintiffs demurred to the second and third separate defenses contained in the amended answer of the defendants, The American Publishers' Association, served their demurrers on the 15th day of September, 1904, and they served a demurrer to the second affirmative defense con-

- 10 tained in the amended answer of The American Booksellers' Association on the 12th day of September, 1904. The demurrer was sustained as to the three separate defenses of The American Publishers' Association, but was overruled as to the second affirmative defense in both sets of answers, with leave, however, to withdraw the demurrer (103 App. Div., 277), which was accordingly done.

There has been no change of parties since issue was joined, except as above stated, and the above are the names of all parties in full.

- 11 Edmond E. Wise was substituted as attorney for the plaintiffs in place of Spiegelberg & Wise.

Plaintiffs' Notice of Appeal to Court of Appeals.

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

12 ISIDOR STRAUS and NATHAN
STRAUS, composing the firm
of R. H. MACY & COMPANY,
Plaintiffs,

against

AMERICAN PUBLISHERS' ASSOCIA-
TION *et al.*,
Defendants.

Sirs.—Please take notice that the above-named plaintiffs hereby appeal to the Court of Appeals

from so much and such part of the judgment entered herein on the 20th day of May, 1909, by Mr. Justice Dowling, as fails or refuses to grant to the plaintiffs an injunction restraining any interference with their purchase or sale of copyrighted books and fails or refuses to award damages suffered by the plaintiffs in the purchase or sale of copyrighted books since May 1st, 1901, and from so much of said judgment as fails or refuses to hold that the combinations, agreements or resolutions of the two defendant associations and their respective members were wholly contrary to the statute law of the State of New York, more particularly of the Laws of 1899, chapter 690, and the Statute Laws of the United States, more particularly of the statute passed on July 2nd, 1890, known as "An Act to protect trade and commerce against unlawful restraints and monopolies," in so far as concerns copyrighted books and, and from each and every part of the said judgment which fails to award the aforementioned damages and fails to make provisions for restraining interference by the defendants with the purchase or sale by the plaintiffs of copyrighted books under or pursuant to the contracts or agreements or resolutions set forth in the complaint.

And an appeal having been taken to the Appellate Division for the First Department from so much and such part of the interlocutory judgment herein entered on the 20th day of November, 1907, by Mr. Justice Dowling, as failed or refused to grant the plaintiffs an injunction restraining the defendants from acts set forth in the complaint so far as such acts related to copyrighted books and from that part of the said interlocutory judgment which refused or failed to adjudge the plaintiffs entitled to recover damages

- 16 against the defendants for the acts of the said defendants so far as the same related to copyrighted books, and the said interlocutory judgment having been affirmed by the Appellate Division, by an order entered and filed in the office of the Clerk of the County of New York on the 10th day of July, 1908, it is the intention of the plaintiffs to review on this appeal the said interlocutory judgment and the said order of the Appellate Division rendered thereon.

Dated New York, June 23rd, 1909.

- 17
EDMOND E. WISE,
Attorneys for Plaintiffs,
Office and P. O. Address,
15 William Street,
Borough of Manhattan,
City of New York.

To STEPHEN H. OLIN, Esq.,
Attorney for Defendant American Publishers Association;

KENNESON, CRANE, EMLEY & RUBINO, Esqs.,
Attorneys for Defendant American Booksellers' Association;

- 18
PETER J. DOOLING, Esq.,
Clerk of the County of New York.

Summons.

19

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

Trial desired in New York County.

ISIDOR STRAUS and NATHAN STRAUS, com-
posing the firm of R. H. MACY & COM-
PANY,

Plaintiffs,

against

AMERICAN PUBLISHERS' ASSOCIATION,
George S. Emory, D. Appleton &
Company; American News Company;
Henry B. Barnes, doing business as A.
S. Barnes & Company; Brentano's, Cen-
tury Company, Henry T. Coates and
Edward J. Scott, co-partners, doing busi-
ness under the firm name of H. T. Coates
& Company; Thomas Y. Crowell, E. Os-
borne Crowell, T. Irving Crowell, and J.
Osborne Crowell, co-partners, doing busi-
ness under the firm name of Thomas Y.
Crowell & Company; G. W. Dillingham
Company; Frank H. Dodd, Bleecker Van
Wagnen and Robert H. Dodd, co-part-
ners, doing business under the firm name
of Dodd, Mead & Company; Doubleday,
Page & Company; E. P. Dutton & Com-
pany, Funk & Wagnalls Company, Har-
per & Brothers, Henry Holt and Charles
Holt, co-partners, doing business under
the firm name of Henry Holt & Company;
George H. Mifflin, James M. Kay, Henry
A. Houghton, Oscar R. Houghton, Albert
F. Houghton, Lucy H. Valentine, co-part-
ners, doing business under the firm name
of Houghton, Mifflin & Company; Mc-
Clure, Phillips & Company, Macmillan
Company, New Amsterdam Book Com-
pany, James Pott and James Pott, Jr.,
co-partners, doing business under the

20

21

- 22 firm name of James Pott & Company; G. P. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, co-partners, doing business under the firm name of J. F. Taylor & Company; Adolf Wessels, doing business as A. Wessels Company; Clarence E. Walcott, individually and as President of the American Booksellers' Association, a voluntary unincorporated Association; Joseph W. Nichols, individually and as Secretary of the American Booksellers' Association; J. Wilson Hart, individually and as Treasurer of the American Booksellers' Association; Baker & Taylor Company, Fleming H. Revell Company, Fowler & Wells Company, Adolph Mackel and John Ammon, co-partners, doing business under the firm name of Leggat Brothers; William R. Jenkins,
- 23
- Defendants.

To the above named Defendants and each of them:

- 24 You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty (20) days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, December 3rd, 1902.

SPIEGELBERG & WISE,

Attorneys for Plaintiffs,

Office and Post Office Address,

44 Broad Street,

Borough of Manhattan,

New York City.

Complaint.

25

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

Trial Desired in New York County.

ISIDOR STRAUS and NATHAN STRAUS, com-
posing the firm of R. H. MACY & COM-
PANY,

Plaintiffs,

against

26

AMERICAN PUBLISHERS' ASSOCIATION,
George S. Emory, D. Appleton &
Company; American News Company;
Henry B. Barnes, doing business as A.
S. Barnes & Company; Brentano's, Cen-
tury Company, Henry T. Coates and
Edward J. Scott, co-partners, doing busi-
ness under the firm name of H. T. Coates
& Company; Thomas Y. Crowell, E. Os-
borne Crowell, T. Irving Crowell, and J.
Osborne Crowell, co-partners, doing busi-
ness under the firm name of Thomas Y.
Crowell & Company; G. W. Dillingham
Company; Frank H. Dodd, Bleecker Van
Waguen and Robert H. Dodd, co-part-
ners, doing business under the firm name
of Dodd, Mead & Company; Doubleday,
Page & Company; E. P. Dutton & Com-
pany, Funk & Wagnalls Company, Har-
per & Brothers, Henry Holt and Charles
Holt, co-partners, doing business under
the firm name of Henry Holt & Company;
George H. Mifflin, James M. Kay, Henry
A. Houghton, Oscar R. Houghton, Albert
F. Houghton, Lucy H. Valentine, co-part-
ners, doing business under the firm name
of Houghton, Mifflin & Company; Mc-

27

- 28 Clure, Phillips & Company, Macmillan Company, New Amsterdam Book Company, James Pott and James Pott, Jr., co-partners, doing business under the firm name of James Pott & Company; G. P. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, co-partners, doing business under the firm name of J. F. Taylor & Company; Adolf Wessels, doing business as A. Wessels Company; Clarence E. Walcott, individually and as President of the American Booksellers' Association, a voluntary unincorporated Association; Joseph W. Nichols, individually and as Secretary of the American Booksellers' Association; J. Wilson Hart, individually and as Treasurer of the American Booksellers' Association; Baker & Taylor Company, Fleming H. Revell Company, Fowler & Wells Company, Adolph Mackel and John Ammon, co-partners, doing business under the firm name of Leggat Brothers; William R. Jenkins, Defendants.
- 29

30

The plaintiffs complain of the defendants and by Spiegelberg & Wise, their attorneys, respectfully show to the Court:

First.—That at all times hereinafter mentioned, plaintiffs were and still are co-partners doing business in the City of New York under the firm name of R. H. Macy & Company, such being a fictitious name, the certificate for which was filed according to law.

Second.—That, as plaintiffs are informed and believe, the defendant the American Publishers' Association is a membership corporation organized and existing under and by virtue of the laws of the State of New York, and its membership is composed of a large number of publishers of books, whose places of business are situated and conducted throughout a number of the States of the United States, as well as the State of New York, and who comprise, as these deponents are informed and believe, about 95%, both in number and extent of business, of the publishers of all kinds of books, magazines or similar commodities, throughout the different States of the United States. 31 32

That the defendant George S. Emory is the manager of said membership corporation, and individually and as such manager, has taken an active part in the unlawful and illegal acts hereinafter more fully described.

Third.—That, as plaintiffs are informed and believe, the defendants,

D. Appleton & Company and the American News Company are corporations organized under the laws of the State of New York.

Henry S. Barnes does business in the City of New York under the name A. S. Barnes & Company. 33

Brentano's and the Century Company are corporations organized under the laws of the State of New York.

Henry T. Coates and Edward J. Scott are co-partners doing business under the firm name of H. T. Coates & Company.

Thomas Y. Crowell, E. Osborne Crowell, T. Irving Crowell, J. Osborne Crowell are co-partners doing business under the firm name of Thomas Y. Crowell & Company.

- 34 G. W. Dillingham Company is a corporation organized under the laws of the State of New York.

Frank H. Dodd, Bleecker Van Wagnen, Robert H. Dodd, are co-partners doing business under the firm name of Dodd, Mead & Company.

Doubleday, Page & Company is a corporation organized under the laws of the State of New York.

E. P. Dutton & Company is a corporation organized under the laws of the State of New York.

Funk & Wagnalls Company is a corporation organized under the laws of the State of West Virginia.

- 35 Harper Brothers is a corporation organized under the laws of the State of New York.

Henry Holt and Charles Holt are co-partners doing business under the firm name of Henry Holt & Company.

George H. Mifflin, George A. Kay, Henry A. Houghton, Oscar R. Houghton, Albert F. Houghton and Lucy H. Valentine are co-partners doing business under the firm name of Houghton, Mifflin & Company.

- 36 McClure, Phillips & Company, Macmillan Company and New Amsterdam Book Company are corporations organized under the laws of the State of New York.

James Pott and James Pott, Jr., are co-partners doing business under the firm name of James Pott & Company.

G. P. Putnam's Sons is a corporation organized under the laws of the State of New York.

Robert H. Russell does business under his said name in the State of New York.

Charles Scribner and Arthur H. Scribner are co-partners doing business under the firm name of Charles Scribner's Sons.

Frederick A. Stokes Company is a corporation organized under the laws of the State of New York. 37

Joseph F. Taylor and Rutger B. Jewett are co-partners doing business under the firm name of J. F. Taylor & Company.

Adolph Wessels does business in the State of New York under the name of A. Wessels & Company.

That, as plaintiffs are informed and believe, the defendants mentioned in this paragraph are all publishers of books and are all members of the American Publishers' Association; that there are numerous other publishers members of said corporation who are unknown to these plaintiffs or who are beyond the jurisdiction of the Court; and that by reason thereof it is impossible to join them as defendants in this action by name. 38

That the defendants mentioned in this paragraph of the complaint are hereinafter referred to as "publishers", and wherever said term hereinafter is used the same is intended to include the defendants set forth in this paragraph.

Fourth.—These plaintiffs allege, on information and belief, that the defendant Clarence E. Walcott is the president of the American Booksellers' Association, a voluntary unincorporated association, more particularly hereinafter described. That the defendant Joseph W. Nichols is the secretary of the said association, that the defendant J. Wilson Hart is the treasurer of said association. These plaintiffs allege, upon information and belief, that said voluntary association known as the American Booksellers' Association is composed of a large number of book dealers at wholesale and at retail, comprising about 90% of all such dealers, both in numbers and extent 39

40 of business, throughout all the States of the United States. That, as these plaintiffs are informed and believe, there are approximately 800 members thereof, many of whom are unknown to these plaintiffs or are beyond the jurisdiction of this Court, and that by reason thereof it is impossible to join all of them as defendants in this action by name.

Fifth.—That amongst the members of the American Booksellers' Association are a number of publishers who do business at wholesale and at retail. That, as plaintiffs are informed and
41 believe, the defendants

Baker & Taylor Company is a corporation organized under the laws of the State of Connecticut.

Fowler & Wells Company is a corporation organized under the laws of the State of New York.

Fleming H. Revell Company is a corporation organized under the laws of the State of Illinois. Adolph Mackel and John Ammon are co-partners, doing business under the firm name of Leggat Bros., and William R. Jenkins does business in the City of New York under his said name.

42 As these plaintiffs are informed and believe, the defendants mentioned in this paragraph are members of said American Booksellers' Association, and have taken an active part in the organization thereof and are dealers at wholesale and retail of books and similar commodities.

That, as hereinbefore stated, the other members of said association are too numerous to be made parties herein by name, but the defendants in this paragraph and the other members of said association are referred to and included in the term "dealers" wherever such term is used with reference to said voluntary association.

Sixth.—That plaintiffs, and their predecessors, under the firm name of R. H. Macy & Company, have, for more than forty years last past, conducted a retail drygoods department store in the City of New York, and have invested therein large sums of money, and have contributed their time, labor and energy, and by their conduct of said business have earned and established a reputation throughout the United States for high commercial integrity and trustworthiness, and their business has earned and established the reputation of supplying all the articles dealt in to customers, or purchasers at retail, at a lower figure than the same article can be obtained anywhere else.

43

44

Seventh.—That among the departments operated and maintained by the plaintiffs and their predecessors was and is a large department for the sale of books, magazines and literature in general, including educational, scientific and religious books, as well as works of current fiction, and all other books and pamphlets published throughout the United States, and in some instances in foreign countries.

Eighth.—That in pursuance of the adopted and settled policy of their said business, all sales in said department, as throughout their business, were made for cash and in no instance for credit, and were made at a smaller profit and, therefore, at a cheaper price than at other retail book stores.

45

Ninth.—That by reason of the foregoing facts the said book department of plaintiff's business became very well known to the public, and the business thereof increased in volume until said book department became one of the largest and

- 46 best known places for the purchase of books and similar commodities at retail in the City of New York and throughout the United States.

Tenth.—That throughout the period that said book department was conducted, the plaintiffs were accustomed in the ordinary course of business to purchase books from various publishers, dealers, jobbers and wholesalers, and to sell their purchases at such additional figures above cost as would insure to them a reasonable profit, and one with which they were thoroughly satisfied.

- 47 *Eleventh.*—That throughout said period their relations with all publishers and dealers with whom they had business transactions were deemed satisfactory both to plaintiffs and to such publishers and booksellers, and whatever criticism was passed by rival booksellers was solely due to the fact that in open and fair competition the plaintiffs had succeeded in continually increasing the volume of their business, and securing a fair and reasonable return of profits, and supplying the consumer or purchaser with the same article at a lower price.

- 48 *Twelfth.*—That throughout the said period the publishers, who also sold and still sell at retail, and retail dealers were accustomed to advertise and offer the sale of books at retail, at certain prices called "list prices," and to deceive the public, or those who were not acquainted with the wiles and customs of the trade, to induce them to believe that said "list prices" were the ordinary retail prices of such books, whereas, in fact, both the publishers and the dealers only obtained such "list prices" at retail from the ignorant and unwary, but gave large and liberal discounts from

said prices at retail to anyone who inquired, or was familiar with the customs of the trade. 49

Thirteenth.—That by reason of such deception and lack of uniformity in the price of the same book, the purchasing public lost confidence in the publishers who sold at retail, and in the dealers, and gave their custom to such dealers in books, amongst others, to these plaintiffs, as had established fixed prices, and where they were assured that the greed of the dealer would not attempt to secure an extortionate profit or charge different persons different prices for the same book.

Fourteenth.—That by reason of the foregoing facts the publishers of books who sold their own and other publishers' books at retail, and a large number of dealers found their business and their profits decreasing. 50

Fifteenth.—That during the year 1900 a number of prominent publishers, including the defendants hereinbefore described as publishers, for the purpose of securing to themselves an unreasonable and extortionate profit, and at the same time with the intent to prevent competition in the sale of books, and for the purpose of establishing and maintaining the prices of all books published by them or any of them, and all books dealt in by them or any of them, and preventing competition in the sale thereof, unlawfully, illegally and contrary to the public policy and the Statutes of the State of New York and of the United States, more especially of certain statutes of the United States passed July 2, 1890, and more particularly described as "An Act to protect trade and commerce against unlawful restraints and monopolies," and set forth in full at page 762 of Volume 1 of Supplement to the Revised Statutes of the 51

- 52 United States, combined and associated themselves together, and as a part of such unlawful combination or scheme formed or incorporated the defendant, the American Publishers' Association, a membership corporation, which included amongst its members the defendants hereinbefore described as publishers, and also a large majority of the publishers of all books in the State of New York and throughout the States of the United States.

- 53 *Sixteenth.*—That in furtherance of such unlawful combination or scheme, immediately after organization the said defendant The American Publishers' Association, and its various members, adopted a resolution and entered into an agreement which was intended to prevent the cutting or reducing of prices on copyright books published by the members of the said Association, by which each of the members of the Association agreed that all copyrighted books published by any of them after May 1st, 1901, should be published and sold at retail at net prices, that is, the published price thereof, and not be subject to any discounts.

- 54 *Seventeenth.*—That as a part of said unlawful scheme and combination the members of the said Association agreed that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to

them by the Association as one who cut such net 55
 prices; and that a dealer or bookseller was defined as one who makes it a regular part of his business to sell books and carry a stock of them for public sale. Furthermore, an office was established for the purpose of carrying out this plan, and the members agreed that, through the agents of the Association, and as members, they would aid in the formation of a Booksellers' Association, the object of which was to be to co-operate with the said American Publishers' Association, and to assist it in said unlawful scheme to maintain the retail net prices on net books as aforesaid, and that the American Publishers' Association 56
 pledged itself to support such Association by every means in its power.

Eighteenth.—That thereafter the American Booksellers' Association, composed of a large majority of booksellers at wholesale and retail throughout the United States, was organized through the efforts and influence of the American Publishers' Association and its members, for the avowed purpose of co-operating with the American Publishers' Association and its members in the unlawful purpose of maintaining the prices of copyright books, and preventing competition 57
 in the sale thereof, and in the supply of all books, whether copyrighted or not. That, in pursuance of said unlawful combination and agreement, said American Booksellers' Association and its members have continuously co-operated with and assisted the American Publishers' Association and the members thereof in establishing and maintaining the prices of such books, and preventing competition in the supply and sale of the same, and still continues so to do; and plaintiffs say that, in compliance with said agreement,

- 58 neither of said Associations, nor any of the members thereof, will sell or supply books at any price to any dealer, whether a member of said Association or not, and whether such books are copyrighted or not, or are not published by said American Book Publishers' Association or its members, who resells, or is suspected of reselling, such copyrighted books at less than the arbitrary net price fixed by said unlawful combination, nor will the said Associations nor any of their members sell or supply any books whatever to anyone who resells, or is suspected of reselling, such copyrighted books to any dealer, who thereafter
- 59 sells the same at less than such arbitrary net price.

60 *Nineteenth.*—That thereafter, and ever since May 1st, 1901, the defendants have unlawfully and contrary to the declared policy of this State and its statutes, maintained such combination, whereby competition in this State, as well as throughout all the States of the United States, in the supply and price of books, has been and is restrained or prevented, and whereby the free pursuit in this State of the lawful business of selling books has been and is restricted or prevented, to the great injury and damage of these plaintiffs.

Twentieth.—That plaintiffs were invited to join such unlawful and illegal conspiracy or combination, and have refused, and still refuse, so to do, and have continued to, and still sell to the public at retail, books copyrighted and otherwise at a reasonable profit, less, however, than the price established by defendants.

Twenty-first.—That for the purpose of forcing and compelling the plaintiffs to join such illegal

and unlawful combination, and of inducing and 61
coercing them to maintain an enhanced uniform
price of books at retail, the defendants conspired
to injure the plaintiffs in their said business of
selling books, and by threats, coercion and in-
timidation, sought, and by like means are still
seeking, to prevent all persons engaged in the
business of publishing, or buying and selling books
at wholesale or retail, from dealing with the
plaintiffs.

Twenty-second.—That the purpose and intent 62
of said unlawful conspiracy or combination is to
established and maintain an increased and exces-
sive price for books, and thereby secure to the
publishers and dealers an enhanced and extor-
tionate profit, and that such purpose and intent
has been and still is being carried into effect suc-
cessfully, to the great profit of such publishers
and dealers.

Twenty-third.—That, as these plaintiffs are in-
formed and believe, there are but few of the large
booksellers throughout the United States who
have not become either expressly or tacitly mem-
bers of such illegal combination.

Twenty-fourth.—That in order to annoy, har- 63
ass and impede plaintiffs in their business, the
defendants, through the American Publishers'
Association and through the American Booksell-
ers' Association and their respective monthly bul-
letins and official publications and otherwise, have
wrongfully attacked and falsely and maliciously
misrepresented these plaintiffs, and in every way
sought to cast reproach upon them, and to
intimidate all persons, both members and non-
members of the associations, from selling them

64 books, and to prevent all publishers, although not members of the association, from likewise furnishing them with books, although said publishers and dealers would be willing so to do but for the threats of defendants, and that from time to time they issued circular letters to the trade, including dealers and publishers outside of said combination, some of which were marked confidential, blacklisting the plaintiffs and warning all persons against doing business with them, and threatening to injure and destroy the business of any dealer or publisher who should sell books to these plaintiffs.

65

Twenty-fifth.—That in addition thereto the defendants, or their agents, in pursuance of their unlawful plan to prevent any publisher or dealer from selling books to the plaintiffs, established a system of espionage in the store of the plaintiffs, and in their warehouses, and upon the buyers in said department, and bribed the employees of plaintiffs to secure information as to the business of plaintiffs and the sources of their book supplies, and whenever they discovered such source of supply, even though such dealer or publisher was not a member of either association, 66 they circulated letters in the trade at large vilifying and abusing such dealer or publisher, and blacklisting them and threatening all others with similar punishment, and cutting off all supplies of books from them, and sought to ruin them and to prevent their earning a livelihood.

Twenty-sixth.—The defendants and the book-dealers, members of the American Booksellers' Association, agitated measures directed against such publishers as were not members of the American Publishers' Association, or who did

not sell copyrighted books at all, and threatened them with loss of business and injury thereto, in case they failed to join the organization of the American Publishers' Association, or sold books to the plaintiffs. 67

Twenty-seventh.—That through a course of intimidation and coercion directed specifically against these plaintiffs, the defendants have unlawfully interfered with the conduct of plaintiff's business, and injured the same by forcing the plaintiffs to adopt secret and cumbersome methods of purchasing books, increasing thereby the expense, and forcing plaintiffs to purchase books at higher prices than other dealers at wholesale obtained the same, and compelling them to purchase books at other cities than in the City of New York, where the plaintiffs conduct their business, and that it was and still is part and parcel of the aforementioned unlawful combination or conspiracy to cause plaintiffs such increased cost of their book supply, and compel them to adopt unusual and secret methods in their business, and that plaintiffs have suffered and still suffer great damage thereby in loss of profits which they otherwise would have made except for such increased cost to them of the books published. 68

Twenty-eighth.—That publishers who are members of the association are in large part dealers at retail, not only in their own publications, but in all publications of all other publishers, and are conducting for the most part general retail book stores, and that by preventing competition and maintaining the prices of books they secured an extortionate advantage and profit to themselves and to each other. 69

- 70 *Twenty-ninth.*—That by reason of the unlawful agreement to maintain prices and prevent competition, and the unlawful conspiracy among the defendants to prevent the plaintiffs from purchasing any books, and selling them at such prices as to them seems desirable, and the intimidations and threats broadly published and widely circulated by the defendants, many dealers and publishers, both those belonging to said associations and others, have refused to sell books at any price to the plaintiffs, to their great damage, although such publishers and dealers have signified their willingness to deal with plaintiffs, but that they
- 71 feared injury from the defendants in their business.

Thirtieth.—That the defendants still continue all said unlawful acts, and threaten to continue the same to the great injury and damage of plaintiffs, and that plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand judgment against the defendants and each of them:

- 72 1st. That the aforementioned and described combination and agreements between the defendant the American Publishers' Association, and its members, and the defendant American Booksellers' Association, and its members, or between said two associations and its respective members, to maintain prices or prevent competition be declared wholly unlawful and null and void.

2nd. Perpetually enjoining and restraining the defendants and each of them, their respective managers, officers, agents, attorneys and servants, and each and all of the members of each of said two defendant associations, from acting under or pursuant to said aforementioned agreements or

either or any of them, or from acting under or pursuant to any resolution or order from either of said associations, its managers, officers or directors or any of them, passed in pursuance of said agreements or combinations, or which are intended to maintain prices of books or similar commodities at retail, or prevent competition in the sale thereof. 73

3rd. Perpetually enjoining and restraining the defendants and each of them, their respective managers, officers, agents, attorneys and servants, and each and all of the members of each of said associations, from applying or putting any such resolution or agreements into force or effect in so far as these plaintiffs or their book business is concerned, and from co-operating in any such plan, and from interfering with said business, and from circulating amongst the defendants, or other members of either of said associations, or the public, any information of any kind intended to injure plaintiffs, or to interfere with their purchases or sales of books, or other similar commodities, or from threatening or warning any or all persons, firms or corporations from dealing with plaintiffs, or inflicting penalties upon them, or any of them, for so dealing with plaintiffs pursuant to any agreements or resolution of either or both of said associations or their members, and from blacklisting or placing on any cut-off lists, the plaintiffs, or any person, firm or corporation, with whom plaintiffs may have done, or may do business, and from publishing or circulating any such lists for the purpose of cutting off the supplies of books or similar commodities of plaintiffs, or such persons, firms or corporations with whom plaintiffs may have done or may do business, and from resorting to any species of threats, intimidation, force or fraud, or promise or persuasion of 74 75

- 76 any kind to accomplish such purpose, or to procure other persons so to do; and also from resorting to any species of threat, persuasion, intimidation or force, either oral or written, expressed or implied, to compel plaintiffs, or any other persons, to join either of said associations, or to maintain prices of books, copyrighted or otherwise, or to cut off, or assist, or advise the cutting off of the book supply, or power to purchase books of plaintiffs or any other persons who refuse to abide by the rules, resolutions or agreements of either of said associations or their respective members.
- 77 4th. That a temporary injunction to like effect be granted pending the trial of this action.
- 5th. That a referee be appointed to take proof of the damages suffered by plaintiffs by reason of the increase of cost and expense owing to the wrongful and unlawful acts of defendants, and that defendants be directed to pay the same to plaintiffs.
- 6th. That the plaintiffs have as damages to their said business by reason of the unlawful acts complained of, the further sum of \$100,000.
- 78 7th. That plaintiffs have such other and further relief as to the Court may seem just and equitable, besides the costs of this action.

SPiegelberg & Wise,
Attorneys for Plaintiffs,
44 Broad Street,
New York City.

STATE OF NEW YORK,) ss.:
County of New York,)

ISIDOR STRAUS, being duly affirmed, deposes and says that he is one of the firm of R. H. Macy and

Company, plaintiffs in this action; that he has 79
 read the foregoing complaint and knows the con-
 tents thereof, and that the same is true of his own
 knowledge, except as to those matters therein
 stated to be alleged upon information and belief,
 and as to those matters he believes it to be true.

ISIDOR STRAUS.

Affirmed to before me this 3d/
 day of December, 1902. }

J. MANHEIMER,
 Notary Public,
 N. Y. Co.

80

81

82 **Amended Answer of Defendants
American Publishers' Association
et al.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

ISIDORE STRAUS and NATHAN STRAUS, com-
posing the firm of R. H. MACY & Com-
pany,

Plaintiffs,

83

against

AMERICAN PUBLISHERS' ASSOCIATION,
George S. Emory, D. Appleton & Com-
pany; American News Company; Henry
B. Barnes, doing business as A. S.
Barnes & Company; Brentano's, Cen-
tury Company, Henry T. Coates and
Edward J. Scott, co-partners doing
business under the firm name of H. T.
Coates & Company; Thomas Y. Crowell,
E. Osborne Crowell, I. Irving Crowell,
and J. Osborne Crowell, co-partners;
doing business under the firm name of
Thomas Y. Crowell & Company; G. W.
Dillingham Company; Frank H. Dodd,
Bleecker Van Wagnen and Robert H.
Dodd, co-partners, doing business under
the firm name of Dodd, Mead & Com-
pany; Doubleday, Page & Company; E.
P. Dutton & Company, Funk & Wagnalls
Company, Harper & Brothers, Henry
Holt and Charles Holt, co-partners, do-
ing business under the firm name of
Henry Holt & Company; George H.
Mifflin, James M. Kay, Henry A. Hough-
ton, Oscar R. Houghton, Albert F.
Houghton, Lucy H. Valentine, co-part-
ners, doing business under the firm name
of Houghton, Mifflin & Company; Me-

84

Clare, Philips & Company, Macmillan Company, New Amsterdam Book Company, James Pott and James Pott, Jr., co-partners, doing business under the firm name of James Pott & Company; G. P. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, co-partners, doing business under the firm name of J. F. Taylor & Company, Adolph Wessels, doing business as A. Wessels Company, and Baker & Taylor Company, impleaded with others,

Defendants.

85

86

The defendants above named, by Stephen H. Olin, their attorney, make amended answer severally and each for himself to the complaint as follows:

I.—These defendants have no knowledge or information sufficient to form a belief as to the truth of the allegation that the members of defendant American Publishers' Association compose about 95% in numbers and extent of business of the publishers of all kinds of books, magazines or similar commodities throughout the different States of the United States.

87

These defendants deny that the defendant George S. Emory is the manager of American Publishers' Association, and they admit that he was such manager up to the 1st day of January, 1903; and they deny upon information and belief that he has taken an active part in any unlawful or illegal acts.

88 II.—These defendants deny that all the defendants named in paragraph Third of the complaint are members, and that any of the corporations therein named is a member of the American Publishers' Association.

89 III.—These defendants are informed that the American Booksellers' Association is composed of a large number of book dealers at wholesale and at retail, as alleged in the complaint, and these defendants have no knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraphs Fourth and Fifth of the complaint not herein admitted.

IV.—These defendants admit that plaintiffs and their predecessors under the firm name of R. H. Macy & Company, have for many years past conducted a retail dry goods department store in the City of New York, and these defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph Seventh of the complaint not hereinbefore specifically admitted.

90 V.—These defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs Eighth, Ninth, Tenth and Eleventh of this complaint.

VI.—These defendants admit that during a certain period certain publishers who also sold and still sell at retail and certain retail dealers were accustomed to advertise and offer the sale of books at retail at certain prices called "list prices"; and these defendants say that they have no knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs Twelfth,

Thirteenth and Fourteenth of the complaint not
hereinbefore specifically admitted. 91

VII.—These defendants admit that during the year 1900 there was incorporated the defendant American Publishers' Association, a membership corporation, and upon information and belief these defendants deny each and every allegation contained in paragraph Fifteenth of the complaint not hereinbefore specifically admitted.

VIII.—These defendants admit, that on or about February 13th, 1901, the American Publishers' Association adopted a certain resolution and entered into a certain agreement embodied in said resolution, a copy of which is hereto annexed, marked Exhibit "A," which is made a part hereof; that thereafter, on the 8th day of January, 1902, this resolution and agreement was amended by the addition thereto of an Article relating to a certain discount to be allowed from the published price of works of fiction (not net) published by members of the said association, a change in Article IV relating to discounts to be allowed to libraries, &c., and in Article VI and the omission of Article XI of the original resolution and agreement, a copy of which said amended resolution and agreement, with the said amended Articles indicated by underscoring, is hereto annexed marked Exhibit "B" and made a part hereof; that thereafter on the 27th day of May, 1902, the said resolution and agreement was further amended by the addition to Article IV thereof of a paragraph relating to the sending of a work of fiction postpaid, a copy of which resolution and agreement, as so amended, is hereto annexed marked Exhibit "C" and made a part hereof; that on the 15th day of January, 1903, Article III of the said 92 93

- 94 resolution and agreement was amended by the addition thereto of a paragraph relating to the sale of protected books in combination with a periodical, and to the said resolution and agreement was further added, on the date last mentioned, an Article numbered twelve relating to an agreement to be entered into by all purchasers of books from the members of the defendant Association aforesaid, a copy of which said resolution and agreement as so amended is hereto annexed, marked Exhibit "D" and made a part hereof; that thereafter on the 13th day of February, 1903, Articles I and IV of the resolution and agreement
- 95 aforesaid, were so amended as to provide for the exclusion, at the option of the purchaser, of certain copyrighted juvenile books from the class of so-called "net" publications, and the inclusion of such books in the class of copyrighted works of fiction (not net), and Article V was likewise, upon the same date, amended so as to grant libraries a discount on certain juvenile books (not net), a copy of which resolution and agreement as so amended is hereto annexed marked Exhibit "E" and made a part hereof; that thereafter on the 13th day of January, 1904, Articles I and V of said resolution and agreement were so amended
- 96 as to apply to all juvenile books, and Article IV thereof was so amended as to provide for the publication and sale of all juvenile books (not net) under the system applying to the publication and sale of copyrighted works of fiction, a copy of which said resolution and agreement as so amended is hereto annexed marked Exhibit "F" and made a part hereof; that thereafter, on the 13th day of March, 1904, Article III of said resolution and agreement was so amended as to make it apply solely to copyrighted books, and so as to provide for the placing of a seller's name on the cut-

off list of the said Defendant Association only under certain changed conditions therein more fully set forth, a copy of which said resolution and agreement as so amended, with the words stricken out by said amendments, interlined, and the words added thereby, underscored, is hereto annexed marked Exhibit "G" and made a part hereof; and these defendants deny that any further or other resolutions or agreement affecting the plan of operation of the said defendant, American Publishers' Association, or any further or other amendments thereof, have been adopted by the members of the said association, and they deny that the purport or effect of any resolution or agreement adopted by them is correctly set forth in Paragraph 16 of the complaint herein, and these defendants deny each and every allegation in said Paragraph 16 of the complaint not hereinbefore specifically admitted.

IX.—These defendants deny that the members of the said defendant, American Publishers' Association, have entered into any agreement in regard to the sale of net copyrighted or other books other than as above set forth in Paragraph 8 of this answer, to which said agreement as set forth in the Exhibits "A" to "G" inclusive, hereto annexed, these defendants respectfully refer and make a part hereof, and they deny that the purport or effect of any agreement entered into by them is correctly set forth in Paragraph 17 of the complaint herein, and they admit that an office of the American Publishers' Association was established, and they deny each and every allegation in Paragraph 17 of the complaint not hereinbefore specifically admitted or controverted.

100 X.—These defendants deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph Eighteenth of the complaint.

XI.—These defendants deny that they have maintained any combination except such as they formed under the resolution and agreement hereinbefore in Paragraph 8 of this amended answer more fully set forth, which said resolution and agreement so as in said Paragraph 8 set forth, from time to time amended, constituted and does still constitute, the plan of the said American
101 Publishers' Association, and they deny that the free pursuit in this State of the lawful business of selling books, has been or is, restricted or prevented to the injury or damage of the plaintiffs, by said combination or by said plan, resolution or agreement or by any act or agreement of these defendants, and these defendants deny each and every allegation contained in Paragraph 19 of the complaint not hereinbefore specifically admitted or controverted.

XII.—These defendants admit that the plaintiffs have continued to, and still sell to the public, at retail, copyrighted books at less than the prices established therefor by the publishers thereof; and these defendants deny that they have knowledge or information sufficient to form a belief as to the truth of the allegation that the said books were, and are, sold by the plaintiffs herein at a reasonable profit, and they deny each and every other allegation contained in Paragraph 20th of the complaint herein not hereinbefore specifically admitted.

102

XIII.—These defendants admit that some of these defendants have refused to sell certain copyrighted books to the plaintiffs, and they admit that the defendant, the American Publishers' Association, has notified certain dealers in books not to deal with the plaintiffs in certain copyrighted books, and these defendants deny upon information and belief each and every allegation in Paragraph Twenty-first of the complaint contained not hereinbefore specifically admitted. 103

XIV.—These defendants deny upon information and belief each and every allegation in Paragraph Twenty-second of the complaint contained. 104

XV.—These defendants deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph Twenty-fourth of the complaint.

XVI.—These defendants admit that prior to the 15th day of January, 1903, certain of the employees of the said defendant, American Publishers' Association, were instructed to, and did, watch the plaintiffs and their employees, so far as they lawfully could, and endeavor so far as they lawfully could to ascertain the sources of the plaintiffs' supply of copyrighted books, but these defendants, upon information and belief, deny that any of the acts of the said defendant Association's employees in so doing were unlawful, and they deny that since said date any of the employees of the said Association have been instructed so to watch the plaintiffs or their employees, or have so watched them; and these defendants, upon information and belief, deny each and every allegation in Paragraph 25th of the complaint contained, not hereinbefore expressly admitted. 105

106 XVII.—These defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs Twenty-sixth and Twenty-seventh of the complaint.

XVIII.—These defendants upon information and belief deny each and every allegation in paragraph Twenty-eighth of the complaint.

107 XIX.—These defendants deny that they have any knowledge or information sufficient to form a belief as to the allegations contained in paragraph Twenty-ninth of the complaint.

XX.—These defendants deny the allegations contained in paragraph Thirtieth of the complaint.

And for a first separate defense to the complaint these defendants upon information and belief allege that the plaintiffs have an adequate remedy at law for damages against these defendants, and that said plaintiffs cannot maintain this action in equity by reason of such facts.

108 For a second separate defense to the complaint herein, these defendants allege that the original plan, rules, resolution or agreement, of the American Publishers' Association, relative to copy-right books, was adopted on the 13th day of February, 1901, a copy of which said plan, rules, resolution or agreement, is hereto annexed, marked Exhibit "A" and made a part hereof; that thereafter, on the 8th day of January, 1902, the said plan was amended by the addition thereto of an Article relating to a certain discount to be allowed from the published price of works of fiction (not net) published by members of the

said Association and a change in Article IV relating to discounts to be allowed to libraries, &c., and in Article VI and the omission of Article XI of the original plan, a copy of which said plan with the said amended Articles indicated by underscoring, is hereto annexed marked Exhibit "B" and made a part hereof; that thereafter on the 27th day of May, 1902, the said plan was further amended by the addition to Article IV thereof of a paragraph relating to the sending of a work of fiction postpaid, a copy of which plan as so amended is hereto annexed marked Exhibit "C" and made a part hereof; that on the 15th day of January, 1903, Article III of the said plan was amended by the addition thereto of a paragraph relating to the sale of protected books in combination with a periodical, and to the said plan was further added, on the date last mentioned, an Article numbered twelve relating to an agreement to be entered into by all purchasers of books from the members of the Defendant Association aforesaid, a copy of which said plan as so amended, is hereto annexed, marked Exhibit "D" and made a part hereof; that thereafter on the 13th day of February, 1903, Articles I and IV of the plan aforesaid, were so amended as to provide for the exclusion, at the option of the publisher, of certain copyrighted juvenile books from the class of so-called "net" publications, and the inclusion of such books in the class of copyrighted works of fiction (not net), and Article V was likewise, upon the same date, amended so as to grant libraries a discount on certain juvenile books (not net), a copy of which plan as so amended is hereto annexed marked Exhibit "E" and made a part hereof; that thereafter on the 13th day of January, 1904, Articles I and V of said plan were so amended as

109

110

111

- 112 to apply to all juvenile books, and Article IV thereof was so amended as to provide for the publication and sale of all juvenile books (not net) under the system applying to the publication and sale of copyrighted works of fiction, a copy of which said plan as so amended, is hereto annexed marked Exhibit "F" and made a part hereof; that thereafter, on the 13th day of March, 1904, Article III of said plan was so amended as to make it apply solely to copyrighted books, and so as to provide for the placing of a seller's name on the cut-off list of the said Defendant Association only under certain changed conditions therein
- 113 more fully set forth, a copy of which said plan as so amended, with the words stricken out by said amendment, interlined, and the words added thereby, underscored, is hereto annexed marked Exhibit "G" and made a part hereof; that no further or other plan of the said defendant, American Publishers' Association relative to copyright books, or any further or other amendments thereof, have been adopted by the members of the said Association. And these defendants admit that up to the 13th day of March, 1904, the members of the said defendant, the American Publishers' Association, refused to sell any books
- 114 to any one who cut the prices of copyrighted books mentioned in the plan aforesaid, or who was known to sell such copyrighted books to any one known to them to cut the prices thereof; and these defendants allege that they do not now, by any agreement with each other, refuse to sell to the plaintiffs or to any one, any but the copyrighted books mentioned in the plan of the American Publishers' Association as embodied in Exhibit "G" hereto annexed, and these defendants allege that the plan, rules, resolution or agreement of the American Publishers' Association do not now

affect or relate to the sale or price of any book except books copyrighted under the Statutes of the United States, as to which the owners of the several copyrights have and enjoy a lawful monopoly; that by the Constitution and Statutes of the United States, the above-named defendants (other than the American Publishers' Association), have in regard to books copyrighted and published by them respectively, the sole liberty of printing, publishing and vending the same, and that in regard to all the matters alleged in the complaint and in the conduct of business by these defendants, they are acting in all respects in accordance with the laws of the State of New York and of the United States of America. 115 116

And these defendants deny as to any other books the acts averred by the plaintiffs in their complaint herein, not hereinbefore specifically admitted.

For a third separate defense, these defendants allege that the original plan, rules, resolutions or agreement of the American Publishers' Association, relative to copyright books, was adopted on the 13th day of February, 1901, a copy of which said plan, rules, resolution or agreement, is hereto annexed, marked Exhibit "A" and made a part hereof; that thereafter, on the 8th day of January, 1902, the said plan was amended by the addition thereto of an Article relating to a certain discount to be allowed from the published price of works of fiction (not net), published by members of the said Association, and a change in Article IV relating to discounts to be allowed to libraries, &c., and in Article VI and the omission of Article XI of the original plan, a copy of which said plan, with the said amended Articles indicated by underscoring, is hereto annexed marked Exhibit "B" and made a part hereof; that thereafter on 117

- 118 the 27th day of May, 1902, the said plan was further amended by the addition to Article IV thereof of a paragraph relating to the sending of a work of fiction postpaid, a copy of which plan, as so amended, is hereto annexed marked Exhibit "C" and made a part hereof; that on the 15th day of January, 1903, Article III of the said plan was amended by the addition thereto of a paragraph relating to the sale of protected books in combination with a periodical, and to the said plan was further added, on the date last mentioned, an Article numbered twelve relating to an agreement to be entered into by all purchasers of books from
- 119 the members of the Defendant Association aforesaid, a copy of which said plan as so amended is hereto annexed, marked Exhibit "D" and made a part hereof; that thereafter on the 13th day of February, 1903, Articles I and IV of the plan aforesaid were so amended as to provide for the exclusion, at the option of the publisher, of certain copyrighted juvenile books from the class of so-called "net" publications, and the inclusion of such books in the class of copyrighted works of fiction (not net), and Article V was likewise, upon the same date, amended so as to grant libraries a discount on certain juvenile books (not net), a
- 120 copy of which plan as so amended is hereto annexed marked Exhibit "E" and made part hereof; that thereafter on the 13th day of January, 1904, Articles I and V of said plan were so amended as to apply to all juvenile books, and Article IV thereof was so amended as to provide for the publication and sale of all juvenile books (not net) under the system applying to the publication and sale of copyrighted works of fiction, a copy of which said plan as so amended, is hereto annexed marked Exhibit "F" and made a part hereof; that thereafter, on the 13th day of March, 1904,

Article III of said plan was so amended as to make it apply solely to copyrighted books, and so as to provide for the placing of the seller's name on the cut-off list of the said Defendant Association only under certain changed conditions therein more fully set forth, a copy of which said plan as so amended, with the words stricken out by said amendment, interlined, and the words added thereby underscored, is hereto annexed marked Exhibit "G" and made a part hereof; that no further or other plan of the said defendant American Publishers' Association, relative to copyright books, or any further or other amendments thereof, have been adopted by the members of the said Association; and these defendants allege that the plan, rules, resolution or agreement of the American Publishers' Association aforesaid, do not affect the sale, price or supply of books not copyrighted; that none of these defendants is under any obligation to sell to the plaintiffs, directly or indirectly, any book published by such defendant and copyrighted under the laws of the United States, and that each of these defendants has by the laws of the United States the sole liberty of vending the copyrighted books published by such defendant, that by the Constitution and Laws of the United States the Courts of the United States have sole and exclusive jurisdiction of cases of copyright and to regulate and define the liberty of vending copyright books; that said County of New York is within the Southern District of New York; in which there is and was a Circuit Court of the United States held for said District. Wherefore this Court has no jurisdiction to compel these defendants to sell their copyright books to the plaintiffs or to grant the relief prayed for in the complaint.

- 124 WHEREFORE, the defendants above named demand judgment that the plaintiff's complaint be dismissed with costs.

STEPHEN H. OLIN,
Attorney for the American
Publishers' Assn. and Others,
Defendants' Publishers,
32 Nassau Street,
Borough of Manhattan,
New York City.

- 125 STATE OF NEW YORK,) ss.:
County of New York,)

FRANK H. SCOTT, being duly sworn, says, that he is the President of the American Publishers' Association, one of the defendants in this action; that he has read the foregoing amended answer and knows its contents, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FRANK H. SCOTT.

- 126 Sworn to before me this)
10th day of September, 1904.)

HORACE D. BYENES,
Notary Public,
New York County.

STATE OF NEW YORK,) ss.:
County of New York,)

CHARLES SRIENER, being duly sworn, says he is one of the defendants in this action; that he has read the foregoing answer and knows its con-

tents, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true. 127

CHARLES SCRIBNER.

Sworn to before me this)
12th day of September, 1904.)

HORACE D. BYRNES,
Notary Public,
New York County.

STATE OF NEW YORK,) ss.: 128
County of New York,

GEORGE S. EMORY, being duly sworn, says, that he is one of the defendants in this action; that he has read the foregoing answer and knows its contents, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

GEORGE S. EMORY.

Sworn to before me this)
12th day of September, 1904.) 129

HORACE D. BYRNES,
Notary Public,
New York County.

130

Exhibit A.**THE AMERICAN PUBLISHERS' ASSOCIATION,**

156 FIFTH AVENUE,
New York.

The following plan to correct some of the evils connected with the cutting of prices on copy-right books was adopted at the meeting of the American Publishers' Association held February 13, 1901:

131

I.—THAT the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; Provided however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

132

II.—IT is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book.

III.—THAT the Members of the Association agree that such net copyrighted books and all other of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known

to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. 133

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

IV.—THAT the only exception to the rule of maintaining the retail price shall be in the case of libraries, which may be allowed a discount of not more than ten per cent. 134

Libraries entitled to this discount may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount.

V.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount however entirely to the individual publisher.

VI.—THAT after the expiration of a year from the publication of any such net copyrighted book, dealers shall not be held to the above restrictions and may sell such book at a cut price but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be so resold to him on demand. 135

VII.—THAT when the publisher sells at retail a book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

136 VIII.—THAT for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all cases of cutting reported and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions.

137 IX.—THAT it shall be the duty of all members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

138 X.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

XL.—THAT the report when adopted by the Board of Directors be submitted to the Association and voted upon in accordance with the Association's Rules, Article II, Section I.

Exhibit B.

139

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 FIFTH AVENUE,
New York.

The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901; amendments referring to fiction were adopted at a meeting held January 8, 1902.

I.—THAT the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; Provided however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade. 140

II.—IT is recommended that the retail price of a net book, marked NET, be printed on a paper wrapper covering the book. 141

III.—THAT the members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has

142 been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided.

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

143 *IV.—THAT the members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent.*

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold but only to name a maximum discount which, however, it is hoped will rarely be given.

144 *V.—THE only exceptions to the foregoing rules shall be in the case of libraries which may be allowed a discount of not more than 10 per cent. on net books and 33 1/3 per cent. on fiction.*

Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

VI.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount however entirely to the individual publisher.

VII.—THAT after the expiration of a year 145
 from the publication of *any copyrighted books issued under these regulations*, dealers shall not be held to the above restrictions and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be so re-sold to him on demand.

VIII.—THAT when the publisher sells at retail a net book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the 146
 City in which the publisher does business.

IX.—THAT for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the manager shall investigate all cases of cutting reported and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions. 147

X.—THAT it shall be the duty of all members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

XI.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net

- 148 books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

Exhibit C.

149

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 Fifth Avenue,
New York.

The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901; amendments referring to fiction were adopted at meetings held January 8, 1902, and May 27, 1902.

150

I.—THAT the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles), and new editions as the individual publishers may desire, books published by subscription, and not through the trade, and such other books as are not sold through the trade.

II.—IT is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book. 151

III.—THAT the members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. 152

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

IV.—THAT the members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. 153

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

When a work of fiction published under this rule is sent postpaid, the price to the purchaser shall be not less than the minimum price plus the postage.

- 154 V.—THE only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 1-3 per cent. on fiction.

Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

- 155 VI.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

VII.—THAT after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be re-sold to him on demand.

- 156 VIII.—THAT when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

IX.—THAT for the purpose of carrying out the above plan the directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the

Board the Manager shall investigate all cases of cutting reported, and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions. 157

X.—THAT it shall be the duty of all members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

XI.—THAT the association, through its agents and members, aid in the formation of booksellers' associations, in the important centres and cities in the United States, the object of which association shall be to assist the Publisher's Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to. 158

Exhibit D.

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 Fifth Avenue,
New York.

The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association, held February 13, 1901; Amendments referring to fiction were adopted at meetings held January 8, 1902, and May 27, 1902.

I.—THAT the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

II.—IT is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book.

III.—THAT the Members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given

to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. 163

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, Protected books in combination with a periodical at less than the trade Subscription price of such periodical plus the NET Minimum Retail price of the book. 164

IV.—THAT the members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent.

The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold but only to name a maximum discount which, however, it is hoped will rarely be given. 165

When a work of fiction published under this rule is sent postpaid the price to the purchaser shall not be less than the minimum price plus the postage.

V.—THE only exceptions to the foregoing rules shall be in the case of libraries which may be allowed a discount of not more than 10 per cent. on net books and 33 1-3 per cent on fiction.

Libraries entitled to these discounts may be defined as those libraries to which access is either

- 166 free or by annual subscription. Book Clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

VI.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount however entirely to the individual publisher.

- 167 VII.—THAT after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be so re-sold to him on demand.

VIII.—THAT when the publisher sells at retail a net book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

- 168 IX.—THAT for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all cases of cutting reported and when directed shall send out notices to the association, jobbers, and the trade, of any persons violating the above provisions.

X.—THAT it shall be the duty of all Members of the Association to report immediately to the said

office all cases of the cutting of prices which may come to their knowledge. 169

XI.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association 170
pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

XII.—THAT in making sales and contracts of sales of their books involving future delivery members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the Association.

172

Exhibit E.

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 FIFTH AVENUE,
NEW YORK.

Plan as Amended to March 4th, 1903.

The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901; amendments referring to fiction, juveniles and other matters were adopted at later meetings.

173

SPECIAL ATTENTION is called to changes in the following Sections: 1, 3 (last paragraph), 4, 5 and 12.

174

I.—THAT the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also at the desire of the individual publisher any new editions, any work of fiction (not juveniles) or any juveniles of the class that may be described as board books, flat picture books or toy books.

II.—IT is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book.

III.—THAT the Members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. 175

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale. 176

It is further agreed by the Members of the Association that they will not themselves offer, nor sell their books to anyone who offers, Protected books in combination with a periodical at less than the trade Subscription price of such periodical plus the NET or Minimum Retail price of the book.

IV.—THAT the Members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile board books, flat picture books, or toy books (not net), published after March 1st, 1903, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction. 177

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not

- 178 net) shall be sold but only to name a maximum discount which, however, it is hoped will rarely be given.

V.—THE only exceptions to the foregoing rules shall be in the case of libraries which may be allowed a discount of not more than 10 per cent. on net books and 33 1/3 per cent. on fiction, and juvenile board books, flat picture books or toy books (not net).

- 179 Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

VI.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

- 180 VII.—THAT after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealer's hands they must be so resold to him on demand.

VIII.—THAT when the publisher sells at retail a net book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the City in which the publisher does business.

IX.—THAT for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board, the Manager shall investigate all cases of cutting reported and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions. 181

X.—THAT it shall be the duty of all Members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge. 182

XI.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to. 183

XII.—THAT in making sales and contracts of sales of their books involving future delivery members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the Association.

Dated, March, 1903.

184

Exhibit F.

THE AMERICAN PUBLISHERS' ASSOCIATION, 156
FIFTH AVENUE, NEW YORK.

Plan as amended to January 14th, 1904.

The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901; amendments referring to fiction, juveniles and other matters were adopted at later meetings.

185

Special Attention is called to changes in the following Sections: 1, 3 (last paragraph), 4, 5 and 12.

186

I.—THAT the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through trade, such other books as are not sold through the trade; also at the desire of the individual publisher, any new editions, any work of fiction or any juvenile.

II.—IT is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book.

III.—THAT the Members of the Association agree that such net copyrighted books and all

others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. 187

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale. It is further agreed by the Members of the Association that they will not themselves offer, nor sell their books to anyone who offers Protected books in combination with a periodical at less than the trade Subscription price of such periodical plus the NET or Minimum Retail price of the book. 188

IV.—THAT the Members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net) published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction. 189

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

190 V.—THE only exceptions to the foregoing rules shall be in the cases of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 1-3 per cent. on fiction, and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not to be entitled to discount on net books, nor to any special discount on fiction or juvenile books.

191 VI.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

VII.—THAT after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so re-sold to him on demand.

192 VIII.—THAT when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the City in which the publisher does business.

IX.—THAT for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board, the Manager shall investigate all cases of cutting

reported, and when directed, shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions. 193

X.—THAT it shall be the duty of all members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

XI.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important center or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to. 194

XII.—THAT in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the Association. 195

196

Exhibit G.

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 Fifth Avenue,
New York.

Plan as Amended to April 1st, 1904.

197 The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association, held February 13, 1901; amendments referring to fiction, juveniles and other matters were adopted at later meetings.

SPECIAL ATTENTION is called to changes in the following Sections: 1, 3, 4, 5, 9 and 12.

198 I.—THAT the Members of the American Publishers' Association agree that *all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore*; Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also at the desire of the individual publisher, any new edition, any work of fiction or any juvenile.

II.—IT is recommended that the Retail Price of a net book, market NET, be printed on a paper wrapper covering the book.

III.—THAT the Members of the Association agree that copyrighted books shall be sold by them to those booksellers only who will maintain

the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their *copyrighted* books *except at retail* to no one *who* cuts such net prices.

199

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

It is further agreed by the Members of the Association that they will not themselves offer, nor sell their *copyrighted* books to any one who offers Protected books in combination with a periodical at less than the trade Subscription price of such periodical plus the NET or Minimum Retail price of the book.

200

IV.—THAT the Members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net) published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 28 per cent; and all the rules for the protection of net books shall apply to this extent to the protection of copyrighted fiction and copyrighted juvenile books published on the same basis as fiction.

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold but only to name a maximum discount which, however, it is hoped will rarely be given.

201

V.—THE only exceptions to the foregoing rules shall be in cases of libraries which may be allowed a discount of not more than 10 per cent. on net books and 33 1-3 per cent. on fiction, and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription.

- 202 Book Clubs are not to be entitled to discount on net books, nor to any special discount on fiction or juvenile books.

VI.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

- 203 VII.—THAT after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions and may sell such book at a cut price; but, if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be so resold to him on demand.

VIII.—THAT when the publisher sells at retail a net book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the City in which the publisher does business.

- 204 IX.—THAT for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board, the Manager shall investigate all cases of cutting reported, and when directed, shall send out notices to the Association, jobbers, and the trade of any persons violating the above provisions, *after giving the person accused of such violation an opportunity to explain his action.*

X.—THAT it shall be the duty of all members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge. 205

XI.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledges itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to. 206

XII.—THAT in making sales and contracts of sales of their books involving future delivery members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the Association. 207

208 **Amended Answer of Defendant Clarence E. Walcott, et al.**

SUPREME COURT,

NEW YORK COUNTY.

Isidor Straus and Nathan Straus, composing the firm of
R. H. Macy & Company,
Plaintiffs,

209

against

CLARENCE E. WALCOTT, individually and as President of the American Booksellers' Association, a voluntary unincorporated association; JOSEPH W. NICHOLS, individually and as Secretary of the American Booksellers' Association, and J. WILSON HART, individually and as Treasurer of the American Booksellers' Association, impleaded with others,

210

Defendants.

The defendants above named, by Kenneson, Crain, Emley & Rubino, their attorneys, make amended answer severally and each for himself to the complaint as follows:

I.—These defendants have no knowledge or information sufficient to form a belief as to the truth

of the allegation contained in paragraph "Second" of the complaint, that the members of the defendant American Publishers' Association, at the time this action was begun, comprised about ninety-five per cent., both in number and extent of business, of the publishers of all kinds of books, magazines or similar commodities throughout the different States of the United States. 211

These defendants admit that the defendant George S. Emory, was at the time this suit was begun the manager of the defendant American Publishers' Association, but allege, on information and belief, that he ceased to be such Manager on or about January 1, 1903; and they deny, upon information and belief, that the said George S. Emory ever took any part, active or otherwise, in any unlawful or illegal acts. 212

II.—These defendants deny any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraph "Third" of the complaint herein.

III.—These defendants admit, as alleged in paragraph "Fourth" of the complaint herein, that the defendants, Clarence E. Walcott, Joseph W. Nichols and J. Wilson Hart, were, at the time this action was begun, respectively the president, secretary and treasurer of the American Booksellers' Association, and that said Association was a voluntary, unincorporated association. The defendants, Clarence E. Walcott and Joseph W. Nichols, have been the president and secretary of said Association continuously since this suit was brought, and still are such president and secretary, but the defendant J. Wilson Hart, has ceased to be the treasurer of said Association, and the treasurer of said Association at present is August Eckle. 213

214 These defendants have no knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph "Fourth" of the complaint herein, that at the time this action was begun the American Booksellers' Association comprised about ninety per cent. of all book dealers, at wholesale and retail, both in numbers and extent of business, throughout all the States of the United States.

215 IV.—These defendants admit, as alleged in paragraph "Fifth" of the complaint herein, that at the time this action was brought amongst the members of the American Booksellers' Association were publishers who did business at wholesale and at retail, but these defendants deny each and all of the other allegations contained in paragraph "Fifth" of the complaint herein.

216 V.—These defendants admit that the plaintiffs and their predecessors, under the firm name of R. H. Macy & Company, had for many years prior to the beginning of this action conducted a retail dry goods department store in the City of New York. These defendants have no knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph "Sixth" of the complaint herein.

VI.—These defendants deny any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraphs "Seventh," "Eighth," "Ninth," "Tenth" and "Eleventh" of the complaint herein.

VII.—These defendants admit, as alleged in paragraph "Twelfth" of the complaint herein, that throughout the said period the publishers

who sold at retail and retail dealers were accustomed to advertise and offer the sale of books at retail at certain prices called "list prices," but these defendants deny any knowledge or information sufficient to form a belief as to the truth of any or all of the other allegations contained in paragraph "Twelfth" of the complaint herein.

217

VIII.—These defendants deny any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraphs "Thirteenth" and "Fourteenth" of the complaint herein.

218

IX.—These defendants admit, as alleged in paragraph "Fifteenth" of the complaint herein, that during the year 1900 the American Publishers' Association, a membership corporation, was incorporated, but they deny any knowledge or information sufficient to form a belief as to any or all of the other allegations contained in paragraph "Fifteenth" of the complaint herein.

X.—These defendants, on information and belief, admit that on or about February 13, 1901, the American Publishers' Association adopted a certain resolution and entered into a certain agreement embodied in said resolution, a copy of which is hereto annexed, marked Exhibit "A" and made a part of this answer as fully as if herein set forth in detail; that thereafter, and on January 8, 1902, this resolution and agreement was amended by adding thereto an article relating to a certain discount to be allowed from the published price of works of fiction (not net) published by members of the said Association, by changing Article "IV," relating to discounts to be allowed to libraries, etc., and Article "VI," and by the omis-

219

220 sion of Article "XI," of the original resolution and agreement, a copy of which said amended resolution and agreement, with the said amended articles indicated by underscoring, is hereto annexed, marked Exhibit "B" and made a part of this answer as fully as if herein set forth in detail; that thereafter, and on May 27, 1902, the said resolution and agreement was further amended by adding to Article "IV" thereof a paragraph relating to the sending of a work of fiction post-paid, a copy of which resolution and agreement, as so amended, is hereto annexed, marked Exhibit "C" and made a part of this answer as fully as if herein set forth in detail; that on January 15, 1903, Article "III" of the said resolution and agreement was amended by adding thereto a paragraph relating to the sale of protected books in combination with a periodical, and to the said resolution and agreement was further added on the date last mentioned an article numbered "XII," relating to an agreement to be entered into by all purchasers of books from the members of the defendant Association aforesaid, a copy of which said resolution and agreement, as so amended, is hereto annexed, marked Exhibit "D" and made a part of this answer as fully as if herein set forth in detail; that thereafter, and on February 13, 1903, Articles "I" and "IV" of the resolution and agreement aforesaid were so amended as to provide for the exclusion, at the option of the purchaser, of certain copyrighted juvenile books from the class of so-called "net" publications, and the inclusion of such books in the class of copyrighted works of fiction (not net), and "Article "V" was likewise upon the same date amended so as to grant libraries a discount on certain juvenile books (not net), a copy of which resolution and agreement, as so amended

221

222

is hereto annexed, marked Exhibit "E" and made a part of this answer as fully as if herein set forth in detail; that thereafter, and on January 13, 1904, Articles "I" and "V" of said resolution and agreement were so amended as to apply to all juvenile books, and Article "IV" thereof was so amended as to provide for the publication and sale of all juvenile books (not net) under the system applying to the publication and sale of copyrighted works of fiction, a copy of which said resolution and agreement, as so amended, is hereto annexed marked Exhibit "F" and made a part of this answer as fully as if herein set forth in detail; that thereafter, and on March 13, 1904, Article "III" of said resolution and agreement was so amended as to make it apply solely to copyrighted books and so as to provide for the placing of a seller's name on the cut-off list of the said defendant Association, only under certain changed conditions therein more fully set forth, a copy of which said resolution and agreement, as so amended, with the words stricken out by said amendments interlined and the words added thereby underscored, is hereto annexed, marked Exhibit "G" and made a part of this answer as fully as if herein set forth in detail.

These defendants, on information and belief, deny that any further or other resolution or resolutions, or agreement or agreements, affecting the plan of operation of the said defendant, American Publishers' Association, or any further or other amendments thereof have been adopted by the said Association or its members; and they deny that the purport or effect of any resolution or agreement adopted by them is correctly set forth in paragraph "Sixteenth" of the complaint herein. And these defendants deny each and every allegation in said paragraph "Sixteenth" of the

- 226 complaint herein not hereinbefore specifically admitted or denied.

XI.—These defendants, on information and belief deny that the members of the defendant American Publishers' Association, ever entered into any agreement in regard to the sale of net, copyrighted, or other books, other than as above set forth in paragraph "IX" of this answer, to which said agreement, as set forth in Exhibits "A" to "G," inclusive, hereto annexed, these defendants respectfully refer; and they deny that
 227 into by them is correctly set forth in paragraph "Seventeenth" of the complaint herein.

They admit that an office of the American Publishers' Association was established, but they deny each and every allegation in paragraph "Seventeenth" of the complaint not hereinbefore admitted or denied.

XII.—These defendants admit, as alleged in paragraph "Eighteenth" of the complaint herein, that after the formation of the American Publishers' Association, the American Booksellers' Association was organized, but they deny each and all
 228 of the other allegations contained in paragraph "Eighteenth" of the complaint herein.

These defendants allege that prior to the beginning of this action the American Booksellers' Association adopted a resolution entitled "Reform Resolution No. 1," a copy of which is hereto annexed, marked Exhibit "H" and made a part of this answer as fully as if herein set forth in detail.

These defendants further allege that in the spring of 1904, and after the Court of Appeals had decided that the complaint herein stated a good

cause of action, the American Booksellers' Association rescinded said Reform Resolution No. 1, and substituted in lieu thereof a resolution designated "Reform Resolution No. 2," a copy of which is hereto annexed, marked Exhibit "1" and made a part of this answer as fully as if herein set forth in detail. The purpose of the Association in rescinding Reform Resolution No. 1 and substituting therefor Reform Resolution No. 2, was to make the resolution apply solely to copyrighted books. These defendants further allege that the said Reform Resolution No. 1 and the said Reform Resolution No. 2 are the only resolutions which have ever been adopted by the American Booksellers' Association, or the members thereof.

220

230

XIII.—These defendants deny that the American Booksellers' Association or its members, or that they, have maintained any combination except the combination formed under the resolutions, copies of which have been annexed to this answer and marked Exhibits "H" and "I."

These defendants deny, as alleged in paragraph "Nineteenth" of the complaint herein, that the free pursuit in this State of the lawful business of selling books has been or is restricted or prevented to the injury or damage of the plaintiffs by the combinations or plans, resolutions or agreements hereinbefore set forth, or by any act or agreement of any of the defendants in this action; and these defendants deny each and every allegation contained in paragraph "Nineteenth" of the complaint, not hereinbefore specifically admitted or denied.

231

XIV.—These defendants deny any knowledge or information sufficient to form a belief as to any or all of the allegations contained in paragraphs

- 232 "Twentieth," "Twenty-first," "Twenty-second,"
 "Twenty-third," "Twenty-fourth," "Twenty-
 fifth," "Twenty-sixth," "Twenty-seventh,"
 "Twenty-eighth," and "Twenty-ninth" of the
 complaint herein.

XV.—These defendants deny each and all of the allegations contained in paragraph "Thirtieth" of the complaint herein.

- 233 XVI.—For a first and separate affirmative defense to the complaint herein, these defendants, upon information and belief, allege that if any right or rights of the plaintiffs herein have been violated, or are being violated, by the defendants herein, or any of them, the plaintiffs have an adequate remedy at law for damages against such wrong doers, and for that reason cannot maintain this action in equity.

- 234 XVII.—For a second and separate affirmative defense to the complaint herein these defendants allege that the original plan, rules, resolution or agreement of the American Publishers' Association was adopted on the 13th day of February, 1901, a copy of which said plan, rules, resolution or agreement is hereto annexed, marked Exhibit "A" and made a part of this answer; that thereafter, and on January 8, 1902, the said plan was amended by adding thereto an article relating to a certain discount to be allowed from the published price of works of fiction (not net) published by members of the said Association, by changing Article "IV," relating to discounts to be allowed to libraries, etc., and Article "VI," and by the omission of Article "XI" of the original plan, a copy of which said plan, with the said amended articles indicated by underscoring, is hereto annexed,

marked Exhibit "B" and made a part of this answer; that thereafter, and on May 27, 1902, the said plan was further amended by the addition to Article "IV" thereof of a paragraph relating to the sending of a work of fiction postpaid, a copy of which plan, as so amended, is hereto annexed, marked Exhibit "C" and made a part of this answer; that on January 15, 1903, Article "III" of the said plan was amended by the addition thereto of a paragraph relating to the sale of protected books in combination with a periodical, and to the said plan was further added on the date last mentioned an article numbered "XII," relating to an agreement to be entered into by all purchasers of books from the members of the American Publishers' Association, a copy of which said plan, as so amended, is hereto annexed, marked Exhibit "D" and made a part of this answer; that thereafter and on the 13th day of February, 1903, Articles "I" and "IV" of the plan aforesaid were so amended as to provide for the exclusion, at the option of the publisher, of certain copyrighted juvenile books from the class of so-called "net" publications, and the inclusion of such books under the class of copyrighted works of fiction (not net), and Article "V" was likewise upon the same date amended so as to grant libraries a discount on certain juvenile books (not net), a copy of which plan, as so amended, is hereto annexed, marked Exhibit "E" and made a part of this answer; that thereafter, and on January 13th, 1904, Articles "I" and "V" of said plan were so amended as to apply to all juvenile books, and Article "IV" thereof was so amended as to provide for the publication and sale of all juvenile books (not net) under the system applying to the publication and sale of copyrighted works of fiction, a copy of which said plan, as so amended, is hereto annexed, marked Exhibit

235

236

237

- 238 "I" and made a part of this answer; that thereafter, and on March 13, 1904, Article "III" of said plan was so amended as to make it apply solely to copyrighted books and so as to provide for the placing of a seller's name on the cut-off list of the said defendant, American Publishers' Association, only under certain changed conditions therein more fully set forth, a copy of which said plan, as so amended, with the words stricken out by said amendments interlined and the words added thereby underscored, is hereto annexed, marked Exhibit "G" and made a part of this answer. That no further or other plan of the said
- 239 defendant, American Publishers' Association, relative to copyrighted or uncopyrighted books, or any further or other amendments thereof have been adopted by the members of the said Association.

These defendants further allege that the only resolutions or agreements with reference to books of any kind, whether copyrighted or uncopyrighted, ever adopted by the American Booksellers' Association, or the members thereof, are the resolutions or agreements copies of which have already been annexed to this answer and marked Exhibits "H" and "I."

- 240 These defendants, upon information and belief, admit that up to the adoption by the defendant, The American Publishers' Association, of the amendments shown in Exhibit "G" annexed to this answer, and up to the adoption by the American Booksellers' Association of Reform Resolution No. 2, a copy of which is annexed to this answer and marked Exhibit "I," members of both the American Publishers' Association and the American Booksellers' Association refused to sell any books to anyone who cut the prices of

copyrighted books mentioned in the plan aforesaid, or who was known to sell such copyrighted books to anyone known to them to cut the prices thereof; and these defendants allege, on information and belief, that the members of neither the American Publishers' Association nor the members of the American Bookseller's Association now, by any agreement, refuse to sell to the plaintiffs, or to anyone, any but copyrighted books mentioned in the plan of the American Publishers' Association as embodied in Exhibit "G," hereto annexed; and these defendants further allege that neither the plan, rules, resolution or agreement of the American Publishers' Association nor the resolutions of the American Booksellers' Association now affect or relate to the sale or price of any book except books copyrighted under the statutes of the United States, as to which the owners of the several copyrights have and enjoy a lawful monopoly; that by the constitution and statutes of the United States defendants have, in regard to books copyrighted and published by them, respectively, the sole liberty of printing, publishing and selling the same; and that in regard to all the matters alleged in the complaint and in the conduct of business by these defendants, they are acting in all respects in accordance with the laws of the State of New York and of the United States of America.

That none of the defendants herein are under any obligation to sell to the plaintiffs directly or indirectly, any copyrighted book, no matter by whom it may be published.

244 WHEREFORE, the defendants above named demand judgment that the plaintiffs' complaint be dismissed with costs.

KENNESON, CRAIN, EMLEY & RUBINO,
Attorneys for above named Defendants,
Office & P. O. Address,
15 William Street,
Borough of Manhattan,
New York City.

245 STATE OF NEW YORK,)
City and County of New York, { ss.:

J. W. NICHOLS, being duly sworn, says:

That he is one of the defendants herein, individually and as Secretary of the American Booksellers' Association; that he has read the foregoing amended answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

J. W. NICHOLS.

246 Sworn to before me this)
29th day of September, 1904. (

CONRAD KREMP,
Notary Public, No. 79,
N. Y. Co.

Exhibit "A."

247

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 Fifth Avenue,
New York.

The following plan to correct some of the evils connected with the cutting of prices on copyright books was adopted at the meeting of the American Publishers' Association, held February 13, 1901:

I.—THAT the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade. 248

II.—IT is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book. 249

III.—THAT the members of the Association agree that net copyrighted books and all other of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and rea-

250 sonable rules and regulations as may be established by local associations as hereinafter provided.

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

IV.—THAT the only exception to the rule of maintaining the retail price shall be in the case of libraries, which may be allowed a discount of not more than ten per cent.

251 Libraries entitled to this discount may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not to be entitled to discount.

V.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

252 VI.—THAT after the expiration of a year from the publication of any such net copyrighted book, dealers shall not be held to the above restrictions and may sell such book at a cut price, but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be so resold to him on demand.

VII.—THAT when the publisher sells at retail a book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

VIII.—THAT for the purpose of carrying out the above plan the Directors of the Association be

authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all cases of cutting reported and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions. 253

IX.—THAT it shall be the duty of all Members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge. 254

X.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important center or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to. 255

XI.—THAT the report when adopted by the Board of Directors be submitted to the Association and voted upon in accordance with the Association's rules, Article II, Section 1.

Exhibit "B."

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 Fifth Avenue,
New York.

The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association, held February 13, 1901; amendments referring to fiction were adopted at a meeting held January 8, 1902.

257 I.—THAT the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

258 II.—IT is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book.

III.—THAT the members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to

them by the Association as one who cuts such 259
prices or who fails to abide by such fair and rea-
sonable rules and regulations as may be estab-
lished by local associations as hereinafter pro-
vided.

A dealer or bookseller may be defined as anyone
who makes it a regular part of his business to sell
books and carries stock of them for public sale.

*IV.—THAT the Members of the Association
agree on all copyrighted works of fiction (not net)
published by them after February 1st, 1902, the
greatest discount allowed at retail for one year
after publication shall be 28 per cent.; and all the 260
rules for the protection of net books shall apply
to the protection of fiction to this extent.*

*The conditions governing the sale of fiction are
such that the Association does not attempt to fix
a uniform price at which works of fiction (not net)
shall be sold, but only to name a maximum dis-
count which, however, it is hoped will rarely be
given.*

*V.—THE only exceptions to the foregoing rules
shall be in the case of libraries, which may be al-
lowed a discount of not more than 10 per cent. on
net books and 33 1-3 per cent. on fiction. 261*

*Libraries entitled to these discounts may be de-
fined as those libraries to which access is either
free or by annual subscription. Book Clubs are
not to be entitled to discount on net books, nor to
any special discount on fiction.*

*VI.—THAT the Association suggests a dis-
count on net copyrighted books of twenty-five per
cent. to dealers as a general discount, leaving the
question of discount, however, entirely to the in-
dividual publisher.*

262 VII.—THAT after the expiration of a year from the publication of *any copyrighted books issued under these regulations*, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so re-sold to him on demand.

263 VIII.—THAT when the publisher sells at retail a net book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the City in which the publisher does business.

264 IX.—THAT for the purpose of carrying out the above plan the directors of the Association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade, of any persons violating the above provisions.

X.—THAT it shall be the duty of all members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

XI.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and

to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to. 265

Exhibit C.

266

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 FIFTH AVENUE,
NEW YORK.

The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901; amendments referring to fiction were adopted at meetings held January 8, 1902, and May 27, 1902.

I.—THAT the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; Provided however that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade. 267

268 II.—IT is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book.

269 III.—THAT the members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided.

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

270 IV.—THAT the Members of the Association agree that on all copyrighted works of fiction (not net), published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent.

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold but only to name a maximum discount which, however, it is hoped will rarely be given.

When a work of fiction published under this rule is sent postpaid the price to the purchaser shall not be less than the minimum price plus the postage.

V.—THE only exceptions to the foregoing rules shall be in the case of libraries which may be allowed a discount of not more than 10 per cent. on net books and 33 1-3 per cent. on fiction. 271

Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

VI.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount however entirely to the individual publisher. 272

VII.—THAT after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be re-sold to him on demand.

VIII.—THAT when the publisher sells at retail a net book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the City in which the publisher does business. 273

IX.—THAT for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all cases of

274 cutting reported and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions.

X.—THAT it shall be the duty of all Members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

275 XI.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

Exhibit D.

277

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 FIFTH AVENUE,
NEW YORK.

The following plan to correct evils connected with the cutting of prices on copyrighted books was adopted at a meeting of the American Publishers' Association, held February 13, 1901; amendments referring to fiction were adopted at meetings held January 8, 1902, and May 27, 1902:

278

I.—THAT the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

279

II.—IT is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book.

III.—THAT the members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known

280 to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided.

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

It is further agreed by the members of the Association that they will not themselves offer, nor sell their books to anyone who offers, Protected
281 books in combination with a periodical at less than the trade subscription price of such periodical plus the NET or Minimum Retail price of the book.

IV.—THAT the Members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent.

The conditions governing the sale of fiction are such that the Association does not attempt to fix
282 a uniform price at which works of fiction (not net) shall be sold but only to name a maximum discount which, however, it is hoped will rarely be given.

When a work of fiction published under this rule is sent postpaid the price to the purchaser shall not be less than the minimum price plus the postage.

V.—THE only exceptions to the foregoing rules shall be in the case of libraries which may be allowed a discount of not more than 10 per cent. on net books and 33 1/3 per cent. on fiction.

Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not to be entitled to discount on net books, nor to any special discount on fiction. 283

VI.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

VII.—THAT after the expiration of a year from the publication of any copyrighted book issued under these regulations dealers shall not be held to the above restrictions and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be so resold to him on demand. 284

VIII.—THAT when the publisher sells at retail a net book published under the rules it shall be at the retail price and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business. 285

IX.—THAT for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all cases of cutting reported and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions.

286 X.—THAT it shall be the duty of all members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

287 XI.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

288 XII.—THAT in making sales and contracts of sales of their books involving future delivery members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the Association.

Exhibit E.

289

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 FIFTH AVENUE,
NEW YORK.

Plan as Amended to March 4th, 1903.

The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901; amendments referring to fiction, juveniles and other matters were adopted at later meetings.

290

Special attention is called to changes in the following sections: 1, 3 (last paragraph), 4, 5 and 12.

I.—THAT the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also at the desire of the individual publisher, any new editions, any work of fiction (not juveniles) or any juveniles of the class that may be described as board books, flat picture books or toy books.

291

II.—IT is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book.

292 III.—THAT the members of the Association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided.

293 A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

It is further agreed by the members of the Association that they will not themselves offer, nor sell their books to any one who offers, Protected books in combination with a periodical at less than the trade subscription price of such periodical plus the NET or Minimum Retail price of the book.

294 IV.—THAT the Members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1, 1902, and on all juvenile board books, flat picture books, or toy books (not net), published after March 1st, 1903, the greatest discount allowed at retail for one year after publication shall be 28 per cent ; and all the rules for the protection of net books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction.

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not

net) shall be sold but only to name a maximum discount which, however, it is hoped will rarely be given. 295

V.—THE only exceptions to the foregoing rules shall be in the case of libraries which may be allowed a discount of not more than 10 per cent. on net books and 33 1-3 per cent. on fiction, and juvenile board books, flat picture books or toy books (not net).

Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction. 296

VI.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

VII.—THAT after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealer's hands, they must be so re-sold to him on demand. 297

VIII.—THAT when the publisher sells at retail a net book published under the rules it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the City in which the publisher does business.

298 IX.—THAT for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board, the Manager shall investigate all cases of cutting reported, and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions.

299 X.—THAT it shall be the duty of all Members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

300 XI.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

XII.—THAT in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the Association.

Dated March, 1903.

Exhibit F.

301

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 FIFTH AVENUE,
NEW YORK.

Plan as Amended to January 14th, 1904.

The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association, held February 13, 1901; amendments referring to fiction, juveniles and other matters were adopted at later meetings. 302

Special attention is called to changes in the following sections: 1, 3 (last paragraph), 4, 5 and 12.

I.—THAT the Members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also at the desire of the individual publisher, any new editions, any work of fiction or any juvenile. 303

II.—IT is recommended that the Retail Price of a net book, marked NET, be printed on a paper wrapper covering the book.

III.—THAT the members of the Association agree that such net copyrighted books and all

304 others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

305 It is further agreed by the members of the Association that they will not themselves offer, nor sell their books to anyone who offers, protected books in combination with a periodical at less than the trade Subscription price of such periodical plus the NET or Minimum Retail price of the book.

306 IV.—THAT the Members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net), published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction.

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold but only to name a maximum discount which, however, it is hoped will rarely be given.

V.—THE only exceptions to the foregoing rules shall be in the cases of libraries which may be allowed a discount of not more than 10 per cent. on net books and 33 1-3 per cent. on fiction, and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book Clubs are not entitled to discount on net books, nor to any special discount on fiction or juvenile books. 307

VI.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount however entirely to the individual publisher. 308

VII.—THAT after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions and may sell such book at a cut price; but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands they must be so re-sold to him on demand. 309

VIII.—THAT when the publisher sells at retail a net book published under the rules it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

IX.—THAT for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the

310 above conditions of sale. Under the direction of the Board the Manager shall investigate all cases of cutting reported and when directed shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions.

X.—THAT it shall be the duty of all Members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

311 XI.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such lawful associations by every means in its power in maintaining such lawful rules and regulations as may in
312 this way be agreed to.

XII.—THAT in making sales and contracts of sales of their books involving future delivery members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the Association.

Exhibit G.

313

THE AMERICAN PUBLISHERS' ASSOCIATION,
156 FIFTH AVENUE,
NEW YORK.

Plan as Amended to April 1st, 1904.

The following plan to correct evils connected with the cutting of prices on copyrighted books was adopted at a meeting of the American Publishers' Association, held February 13, 1901; amendments referring to fiction, juveniles and other matters were adopted at later meetings. 314

SPECIAL ATTENTION is called to changes in the following sections: 1, 3, 4, 5, 9 and 12.

I.—THAT the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also at the desire of the individual publisher, any new editions, any work of fiction, or any juvenile. 315

II.—IT is recommended that the Retail Price of a net book marked NET, be printed on a paper wrapper covering the book.

III.—That the members of the Association agree that copyrighted books shall be sold by

- 316 them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their *copyrighted* books *except at retail*, to no one *who* cuts such net prices.

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books, and carries stock of them for public sale.

- 317 It is further agreed by the members of the Association that they will not themselves offer, nor sell their *copyrighted* books to any one who offers Protected books in combination with a periodical at less than the trade Subscription price of such periodical plus the NET or Minimum Price of the book.

- 318 IV.—THAT the Members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net), published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of copyrighted fiction and copyrighted juvenile books published on the same basis as fiction.

The conditions governing the sale of fiction are such that the Association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

V.—The only exceptions to the foregoing rules shall be in cases of libraries which may be allowed

a discount of not more than 10 per cent. on net books and 33 1-3 per cent. on fiction, and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction or juvenile books. 319

VI.—THAT the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher. 320

VII.—THAT after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but, if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so re-sold to him on demand.

VIII.—THAT when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business. 321

IX.—THAT for the purpose of carrying out the above plan the Directors of the Association be authorized to establish an office and engage a suitable person as Manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all cases of

322 cutting reported, and when directed, shall send out notices to the Association, jobbers, and the trade, of any persons violating the above provisions, *after giving the person accused of such violation an opportunity to explain his action.*

X.—THAT it shall be the duty of all Members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

323 XI.—THAT the Association through its agents and members aid in the formation of booksellers' associations in the important centres and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as
324 may in this way be agreed to.

XII.—THAT in making sales and contracts of sales of their books involving future delivery members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the Association.

Exhibit H.

325

Reform Resolution No. 1.

Whereas, the American Publishers' Association has adopted a net-price system and entered into an agreement for its maintenance, by which the members of said Association will cut off the supply of all of their books, net, copyrighted or otherwise, to any dealer who fails to maintain the net price of any or all books published under the net-price system;

1. Now, therefore, be it Resolved, That this, the American Booksellers' Association, in convention assembled, accept the said net-price system, with the distinct understanding that it is the intention of the American Publishers' Association to include fiction under the net-price system as rapidly as possible; and 326

2. Furthermore, be it resolved, That all members of the American Booksellers' Association shall give to each of the members of the American Publishers' Association, and to all publishers who co-operate with them in the maintenance of the net-price system, our most cordial support; and that to this end we agree not to buy, not to keep in stock, nor to offer for sale, after due notification, the books of any publisher who declines to support the net-price system. 327

3. Furthermore, be it resolved, That we instruct our secretary promptly to notify all members of this Association that this resolution is applicable and in force with reference to any publisher who shall have made it manifest that he is unwilling to co-operate with this Association, and with the members of the Publishers' Association, in the maintenance of the net-price system.

328 4. Furthermore, be it resolved, That this resolution on being ratified by two thirds of the members of this Association, voting by formal ballot, shall immediately become a law to each and all of the members of this Association; and if it shall appear upon the presentment of any three members of this Association that a member has purchased, put in stock, or offered for sale, the books of a publisher who has been formally denounced, such member shall be expelled from membership in this Association, and all members of this Association shall then and thereafter be restrained from supplying any books to such expelled member at a discount from the usual retail price.

329 5. Furthermore, be it resolved, That all members of this Association shall be restrained from furnishing any books, at less than the net or usual retail price, to any dealer who shall have been denounced by the Publishers' Association for cutting the price of net books, or for otherwise violating the net price system, and who shall have been therefor cut off by the members of the Publishers' Association from the supply of their books.

330 6. Furthermore, be it resolved, That all members of this Association shall endeavor to keep in stock and push the sale of net books so long as they are reasonably in demand, provided such discount is allowed by the publishers to the dealers as will yield them a living profit; and they shall maintain the net price of the same in accordance with the terms of the publishers' agreement for the maintenance of the net-price system.

Exhibit I.

331

REFORM RESOLUTION No. 2.

WHEREAS, the American Publishers' Association has adopted a net-price system and entered into an agreement for its maintenance, by which the members of said Association will cut off the supply of all their copyrighted books to any dealer who fails to maintain the net price of any or all copyrighted books published under the net-price system.

1. Now, therefore, be it resolved, That this, the American Booksellers' Association, in convention assembled, accept the said net-price system, with the distinct understanding that it is the intention of the American Publishers' Association to include copyrighted fiction under the net-price system as rapidly as possible; and

332

2. Furthermore, be it resolved, That all members of the American Booksellers' Association shall give to each of the members of the American Publishers' Association, and to all publishers who co-operate with them in the maintenance of the net-price system, our most cordial support; and that to this end we agree not to buy, not to keep in stock, nor offer for sale, after due notification, the copyrighted books of any publisher who declines to support the net-price system.

333

3. Furthermore, be it resolved, That we instruct our Secretary promptly to notify all members of this Association that this resolution is applicable and in force with reference to any publisher who shall have made it manifest that he is unwilling to co-operate with this Association, and with the members of the Publishers' Association, in the maintenance of the net-price system.

- 334 4. Furthermore, be it resolved, That this resolution, on being ratified by two-thirds of the members of this Association, voting by formal ballot, shall immediately become a law to each and all of the members of this Association; and if it shall appear upon the presentment of any three members of this Association that a member has purchased, put in stock, or offered for sale, the copyrighted books of a publisher who has been formally denounced, such member shall be expelled from membership in this Association, and all members of this Association shall then and thereafter be restrained from supplying any copyrighted books to such expelled member at a discount from the usual retail price.
- 335

5. Furthermore, be it resolved, That all members of this Association shall be restrained from furnishing any copyrighted books at less than the net or usual retail price, to any dealer who shall have been denounced by the Publishers' Association for cutting the price of net copyrighted books, or for otherwise violating the net-price system, and who shall have been therefor cut off by the members of the Publishers' Association from the supply of their copyrighted books.

- 336 6. Furthermore, be it resolved, That all members of this Association shall endeavor to keep in stock and push the sale of net copyrighted books so long as they are reasonably in demand, provided such discount is allowed by the publishers to the dealers as will yield them a living profit; and they shall maintain the net prices of the same in accordance with the terms of the publishers' agreement for the maintenance of the net-price system.

Decision.

337

At a Special Term of the Supreme Court of the State of New York, held in and for the County of New York, on the 19th day of November, 1907, at the County Court House, Borough of Manhattan, City of New York, at Part III thereof.

Present—Hon. VICTOR J. DOWLING, Justice.

ISIDOR STRAUS and NATHAN STRAUS, composing the firm of R. H. MACY & COMPANY,

Plaintiffs,

against

AMERICAN PUBLISHERS' ASSOCIATION, George S. Emory, D. Appleton & Company; American News Company; Henry B. Barnes, doing business as A. S. Barnes & Company; Brentano's, Century Company, Henry T. Coates and Edward J. Scott, co-partners, doing business under the firm name of H. T. Coates & Company; Thomas Y. Crowell, E. Osborne Crowell, T. Irving Crowell, and J. Osborne Crowell, co-partners, doing business under the firm name of Thomas Y. Crowell & Company; G. W. Dillingham Company; Frank H. Dodd, Bleecker Van Wagnen and Robert H. Dodd, co-partners, doing business under the firm name of Dodd, Mead & Company; Doubleday, Page & Company; E. P. Dutton & Company, Funk & Wagnalls Company, Harper & Brothers, Henry Holt and Charles Holt, co-partners,

338

339

- 340 doing business under the firm name of Henry Holt & Company; George H. Mifflin, James M. Kay, Henry A. Houghton, Oscar R. Houghton, Albert F. Houghton, Lucy H. Valentine, co-partners, doing business under the firm name of Houghton, Mifflin & Company; McClure, Phillips & Company, Macmillan Company, New Amsterdam Book Company, James Pott and James Pott, Jr., co-partners, doing business under the firm name of James Pott & Company; G. P. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, co-partners, doing business under the firm name of J. F. Taylor & Company, Adolph Wessels, doing business as A. Wessels Company, Clarence E. Walcott, individually and as President of the American Booksellers' Association, a voluntary unincorporated Association, Joseph W. Nichols, individually and as Secretary of the American Booksellers' Association, J. Wilson Hart, individually and as Treasurer of the American Booksellers' Association, Baker & Taylor Company, Fleming H. Revell Company and William R. Jenkins,
- 341
- 342
- Defendants.

DECISION.

This case having come on for trial before this Court, without a jury, at a Special Term, held in Part III thereof, on the 13th, 14th, 16th, 17th, 20th, 21st and 23rd days of May, 1907, and the plaintiffs having duly presented their proofs by John G. Carlisle Esq., and Edmond E. Wise, Esq.,

their counsel, and the defendants, the American Publishers' Association and the plaintiffs designated as publishers in paragraph III of the complaint having duly appeared and filed their answers and presented their proofs by Stephen H. Olin, Esq., their counsel, and the defendants the American Booksellers' Association and the defendants designated as bookdealers in paragraph V of the complaint having duly appeared and filed their answers and presented their proofs by Thaddens D. Kenneson, Esq., their counsel; 343

Now, on reading and filing the pleadings, papers and proceedings herein, and after due deliberation upon the same, and on the proofs presented at the trial, I, Victor J. Dowling, one of the Justices of the Supreme Court, do hereby find the following findings of fact and conclusions of law: 344

FINDINGS OF FACT.

1. That prior to the last day of May, 1901, the plaintiffs were and still are co-partners in business and conducting a retail department store in the City of New York, Borough of Manhattan, under the firm name and style of R. H. Macy & Company. 345

2. That among other departments in their said store the plaintiffs conducted a department for the retail sale of books of all kinds, copyrighted and uncopyrighted, and that such retail sale of books in said department amounts to about \$250,000 a year.

3. That the defendant the American Publishers' Association was incorporated on or about December 31st, 1900, under Article XI of the Member-

- 346 ship Corporations Law, and its objects were stated in the certificate filed to be to advance the interests of the book publishing business; to foster the trade and commerce of said business and the interests of those engaged therein and in its allied trades and professions; to reform abuses relative to said business; to secure freedom from unjust or unlawful exactions; to diffuse accurate and reliable information as to the standing of merchants and other matters; to procure uniformity and certainty in the custom and usages of the trade and commerce of book publishing; to settle differences between its members and between them and others carrying on business with its members, and to promote a more enlarged and friendly intercourse in the trade and between business men generally; to provide and establish rules and regulations tending to promote the best interests of its members. Its principal office was in the Borough of Manhattan. The directors for the first year were Charles Scribner, George H. Mifflin, George P. Brett, G. B. M. Harvey, A. C. McClure, Craigie Lippincott, Daniel Appleton, Frank H. Scott and Frank H. Dodd. The Association adopted by-laws and occupied an office. The Board of Directors appointed the defendant
- 348 George T. Emory as manager.

4. That the American Publishers' Association, one of the defendants, is a domestic corporation, organized on the 31st day of December, 1900.

5. That the members of said American Publishers' Association were corporations, firms and individuals engaged in the business of publishing copyrighted and uncopyrighted books, and selling the same at wholesale or retail or both, throughout the various States and territories of the United States, including the State of New York.

6. That only publishers of books were eligible to membership in said Publishers' Association. 349

7. That the corporations, firms and individuals enumerated in paragraph III of the complaint and designated as publishers were amongst the members of said American Publishers' Association.

8. That the membership of said American Publishers' Association included almost all the well-known publishers who did, probably, 75% of the publishing business not only in the State of New York, but in the whole United States both in copyrighted and uncopyrighted books.

9. That a number of the members of the American Publishers' Association published and sold only Bibles or uncopyrighted books. 350

10. That a number of the members of the said American Publishers' Association published both copyrighted and uncopyrighted books.

11. After the incorporation of the American Publishers' Association the American Booksellers' Association was formed as a voluntary unincorporated Association. The members of this Association were sellers of books either at retail or at wholesale or at both retail and wholesale and some of its members were also publishers of books and many of the members sold both copyrighted and uncopyrighted books. 351

12. That the defendant the American Booksellers' Association is a voluntary unincorporated association, composed of wholesale and retail booksellers throughout the States and Territories of the United States, including the State of New York, and that a number of publishers were also members of the American Booksellers' Association. The firms, corporations and individuals mentioned in the fifth paragraph of the complaint

352 are amongst the members of the said American Booksellers' Association.

13. That the membership of the American Booksellers' Association included a large majority in numbers and in extent of business of both the wholesale and retail book trade.

14. That the members of said association dealt in copyrighted and uncopyrighted books.

15. That the plaintiffs refused to become a member of the American Booksellers' Association or to abide by its rules.

353 16. That prior to May, 1901, it was customary to sell books at retail at so-called list prices, list price being the published price from which the retailer allowed various discounts to various people.

17. That the plaintiffs in their book department did not sell books at list prices, but at a fixed price without any discount.

354 18. That during the spring and fall of 1900, a number of prominent publishers and a number of booksellers conferred together for the purpose of concerted action looking towards the maintenance of a fixed price by all dealers in copyrighted books.

19. That thereafter an organization committee of publishers was appointed, which communicated with various booksellers throughout the United States and invited answers to various questions concerning the establishment of a fixed price and the preventing of competition in the sale of copyrighted books.

20. That thereafter the American Publishers' Association was formed which, on February 13, 1901, adopted a resolution and all its members

agreed to observe such resolution and to be bound thereby. Said resolution is correctly set forth as Exhibit A annexed to the answer of the American Publishers' Association. 355

21. On January 8, 1902, the plan and rules were amended as appears by Exhibit B attached to said answer and said plan and rules were from time to time amended as set forth in the second separate defense in the said answer contained. On or about the 23rd day of January, 1907, the said plan and rules were by the said Association repealed and rescinded.

22. That the members of the American Booksellers' Association, sympathizing with the declared object of the American Publishers' Association to sell at a uniform price all copies of the same copyrighted books to be thereafter published by any member of the American Publishers' Association, at a net price, the American Booksellers' Association, with the approval of the American Publishers' Association, adopted a resolution and its members entered into agreements to co-operate with the Publishers' Association and its members in the maintenance of said net price system, which said resolution or agreement, known as Reform Resolution No. 1 is correctly set forth as Exhibit H annexed to the answer of the defendant American Booksellers' Association. 356 357

23. That said resolutions and agreements were put into effect on the first day of May, 1901. That since the time of the adoption of said resolution the two associations and their various members continually combined and co-operated to carry into effect the rules, regulations and agreements adopted by said two associations and their respective members.

358 24. That since May 1st, 1901, the majority of copyrighted books were published at net prices; that is, at prices from which no discounts were allowed, pursuant to the rules of the Publishers' Association.

25. That thereafter a large majority of all dealers throughout the various States of the United States, in accordance with the rules and regulations and by agreements with the aforesaid associations, maintained such net prices on copyrighted books and that competition in the prices of such net copyrighted books at retail was thereby almost completely destroyed.

359 26. The American Publishers' Association received information as to price cutting from the American Booksellers' Association and from others and made investigation for itself before taking action upon such information.

27. The Booksellers' Association and its Secretary offered advice and suggestions from time to time to the American Publishers' Association.

360 28. That the defendant Associations and their various members gave information to the respective associations to which they belonged, whenever they discovered the cutting of prices of net copyrighted books or competition in the sale thereof at retail, and if such fact was established, the American Publishers' Association issued a list to the members of the American Publishers' Association and to the large jobbing houses directing them to discontinue the sale of any books of any kind, whether copyrighted or uncopyrighted to the offender, and such directions were obeyed.

29. That such list was furnished to the American Booksellers' Association, and was published in the monthly report of the Secretary of said

Association, and sent to all the trade under the head of "Dealers Whose Supplies Have Been Cut Off." 361

30. That the said American Publishers' Association further investigated in case any dealer or publisher sold books of any kind whether copyrighted or uncopyrighted to an offender so placed on such cut-off lists, and if it was found that any dealer or publisher had furnished books to an offender, whether copyrighted or uncopyrighted, such publisher or dealer was likewise placed upon the cut-off list, which thereafter was sent to members of the Publishers' Association and published in the monthly report of the Secretary of the Booksellers' Association and circulated among the trade at large. 362

31. That the American Publishers' Association furthermore circulated a so-called list No. 2, which contained the names of dealers who were suspected of intending to sell to so-called price-cutters, meaning thereby persons who refused to maintain prices on net copyrighted books, and members of the American Publishers' Association, and wholesale jobbers were warned not to sell any books of any kind, whether copyrighted or uncopyrighted, to any individuals on said list until they had signed an agreement to abide by the rules and regulations of the American Publishers' Association, such agreement being an agreement with the American Publishers' Association as set forth as Exhibit: 363

"AMERICAN PUBLISHERS' ASSOCIATION.

In consideration of discount allowed on books bought from _____ we hereby agree that for one year from date of publication we will not sell net books at less than the retail prices fixed by the respective

364 publishers, nor fiction published after February 1, 1902, at a greater discount than 28 per cent. at retail, as provided by the rules of the American Publishers' Association. We further agree that we will not sell books published by members of the American Publishers' Association to any dealer known to us to cut prices of net books or of new fiction, except as provided above."

32. That said list of suspected dealers was circulated amongst members of the American Publishers' Association and also jobbers or wholesalers in books, and was observed and obeyed by them.

365 33. Dealers who were placed upon the cut-off lists by the American Publishers' Association were removed from such lists upon giving assurance that they would in future deal with books published by members of the Association in compliance with the rules relating to price cutting.

34. That the American Booksellers' Association and its members co-operated with the American Publishers' Association and its members in the maintenance of the said net price system and the enforcement of its rules, and obeyed and enforced all the rules and regulations of said two associations.

366 35. Between May 1, 1901, and the adoption by the American Booksellers' Association of such Reform Resolution No. 2, the Association sought to enforce the so-called Reform Resolution No. 1 by having its members refuse to sell books of any kind: (1) to any bookseller selling copyrighted books published by members of the American Publishers' Association as net price books at prices less than the net prices fixed by the publishers; and (2) to any bookseller who sold any books to a

bookseller who sold any such net price copyrighted books at less than such net prices. 367

36. That its secretary published a monthly report circulated to the trade, which contained the lists of persons, firms and corporations who were not to be supplied with books of any kind whatsoever issued by the members of the American Publishers' Association, and that any dealer who supplied books to any one mentioned in said list was likewise cut off from his supply of books.

37. That the publishers of any copyrighted or uncopyrighted books who failed or neglected to become members of the American Publishers' Association and to abide by its rules as to the sale of books to appropriate persons were invited to join by the American Booksellers' Association. 368

38. That by special agreement entered into with the organization committee of the American Publishers' Association, the members of the American Booksellers' Association were bound not to buy, not to put in stock, nor to offer for sale the books of any publisher who shall have finally declined to co-operate in the maintenance of the net price system by joining the American Publishers' Association and issuing books under the net price system. 369

39. That said publishers of uncopyrighted books were informed that all booksellers were pledged not to deal in and not to handle the books of any firm, individual or corporation that published books, either copyrighted or uncopyrighted, that did not co-operate with the American Publishers' Association.

40. That said publishers of uncopyrighted books were informed by the American Booksellers' Association that co-operation with the American Publishers' Association could only be maintained

370 through joining the American Publishers' Association and by abiding by all its rules and regulations.

41. That thereafter a number of such publishers did join such association and obeyed all its rules and regulations, and that several who did not join were placed on the cut off lists and the rules were applied to them.

371 42. That under and pursuant to various resolutions, regulations and agreements entered into by said two associations and their respective members, any retail dealer who failed to maintain the net price, or any wholesale dealers who supplied books to such dealer, were cut off from their supply of books of any and all kinds, whether copyrighted or uncopyrighted, and were thereafter unable to buy books of any kind in the ordinary or usual method.

43. That on or about the 1st day of May, 1901, the plaintiff sold the copyrighted book "Tarry Thou Till I Come" at \$1.24 per volume.

44. That said book had been published by the Funk & Wagnalls Company at the net price of \$1.40.

372 45. That the plaintiffs refused the request of the American Publishers' Association to sell said book at the net price.

46. That thereafter a letter was issued by the American Publishers' Association to its members directing them to discontinue the sale of any and all books to R. H. Macy & Company, the plaintiffs herein.

47. That thereafter the American Booksellers' Association issued a cut-off list containing the name of R. H. Macy & Company.

48. That the ordinary rate of discount on the wholesale sale of books was 40% from the list price, and in quantities 40 and 5% discount from the list price, and in larger quantities 40 and 10% discount from the list price, and an additional discount for cash. 373

49. That the discount at wholesale for net books, after May, 1901, was 25% with additional discount for larger quantities, and on restricted books the same as theretofore.

50. That thereafter the plaintiffs, in the ordinary course of business, were unable to secure a supply of books for their department, except in unusual ways. 374

51. That the plaintiffs continued to sell books of the same character, size and style at the same prices after May 1st, 1901, as prior to that time.

52. That in each instance such price was less than the net price fixed by the publishers for copyrighted books.

53. That the so-called \$1.50 book was sold by R. H. Macy & Company at 98 cents prior to the first day of May, 1901, and that after that date the so-called \$1.50 book was sold at 98 cents.

54. That the net or restricted price for a book formerly known as a \$1.50 book was about \$1.08. 375

55. That from the first week in May, 1901, till February, 1904, under and pursuant to the rules of the defendant associations and the agreements of its members, R. H. Macy & Company were unable to purchase supplies of books for their book department in the ordinary course of business and with the customary discounts. That during said period the two associations sought by all means in their power, including the employment of detectives, to ascertain the sources of plaintiffs' book

376 supply, and whenever they did so ascertain it, the persons who sold books to the plaintiffs, whether they were members of either association or not, were placed upon the cut-off lists and were in turn deprived of the power to buy books in the ordinary and usual course, and with the customary discounts.

56. There is no evidence that the American Booksellers' Association or any of its members have ever employed detectives for any purpose.

377 57. That in some instances individuals and dealers in books who had supplied R. H. Macy & Company were wholly ruined and driven out of business.

58. That the American Booksellers' Association widely circulated the names of such dealers who had been so driven out of business and warned dealers, whether members of either association or not, to avoid the fate of such booksellers.

378 59. That various circulars were issued to the trade at large, including members and non-members of both associations, by both said associations warning all persons against dealing with these plaintiffs or any other so-called price-cutters.

60. That in 1902, the American Publishers' Association, at the request of the American Booksellers' Association, modified its rules and regulations so as to provide that works of fiction could be sold at a restricted price, meaning thereby that the former list price was re-established with a maximum discount amount set forth.

61. That such maximum discount was 28% ; so that the sale of the so called \$1.50 book could be had at any price between \$1.08 and \$1.50, and that a sale at less than \$1.08 would be punished by

the associations as price-cutting on copyrighted books. 379

62. That the plaintiffs sold said \$1.50 book at a minimum price of 98 cents and continued to do so.

63. That other books were sold by the plaintiffs at retail to the public at less than either the restricted or net price, and that until the time of the trial the plaintiffs continued to sell books at retail at less than the net or restricted price fixed by the publishers and maintained under the rules and regulations of the said two associations.

64. That thereafter and on or about the 1st of April, 1904, the American Publishers' Association amended its rules and regulations in various respects more especially by providing that such rules and regulations should apply only to the sale of copyrighted books. A copy of such resolution is correctly set forth as Exhibit G annexed to the answer of the American Publishers' Association. 380

65. Subsequently and about April 1st, 1904, and after the decision of the Court of Appeals of the State of New York in this action, reported in Volume 177 of the Official Reports of the Decisions of the Court of Appeals, at page 473, the American Booksellers' Association duly rescinded the said Reform Resolution No. 1, and duly adopted as a substitute therefor the so-called Reform Resolution No. 2, a copy of which is annexed to the answer interposed in this action by the defendants Walcott, Nichols and Hart. 381

66. This action of the American Booksellers' Association was taken so as to exclude for the future any possible restriction upon its members in respect of uncopyrighted books and to conform the future action of the Association and its members to the views expressed by the Court of Appeals of the State of New York.

382 67. That thereafter the said two associations and their respective members continued the same methods as to ascertaining the plaintiffs' supply of copyrighted books, of cut-off lists and of circulars to the trade which had been adopted by them prior to the amendment of the resolutions and agreements in April, 1904.

68. That thereafter and until the trial of this action the plaintiffs had been continued on the cut-off lists issued by the respective associations and were unable to secure a supply of copyrighted books in the ordinary course of business and with the customary discounts.

383 69. That thereafter the plaintiffs continued to purchase copyrighted books in unusual and indirect ways.

70. That the copyrighted books covered by the rules included books, the copyrights of which were not owned by members of the American Publishers' Association.

71. That the American Publishers' Association was not the owner and had no interest in the copyrights of any of the books published since the first day of May, 1901, or prior thereto.

384 72. That the American Booksellers' Association was not the owner and had no interest in the copyrights of any of the books published since the first of May, 1901, or prior thereto.

73. That the members of the American Booksellers' Association who were not publishers were not the owners of and had no interest in the copyrights of any books published since the first of May, 1901, or prior thereto.

74. That the members of the American Publishers' Association were each sole owners of the copyrights of the books published by them respectively.

75. That none of the copyrights of the books published were owned by any other firm or individual than the one to which such member belonged. 385

76. That the members of the said two associations resided in and carried on their business of selling books in many different states of the United States, and were engaged in the business of purchasing books, copyrighted and uncopyrighted; from each other and from other persons in many states other than the state in which the purchaser resided and did business.

77. That the rules, regulations and agreements of the said two associations and their respective members were applied and enforced from the first day of May, 1901, as from time to time amended, against all publishers and dealers in books throughout the different states of the United States, whether such publishers and dealers were or were not members of either of such associations and whether they purchased books in one state for transportation and delivery in another, or for delivery in the state where purchased. 386

78. That the members of the said two associations have heretofore purchased, distributed and sold since the first day of May, 1901, and still purchase, distribute and sell, at wholesale and retail, the large majority of all copyrighted and of all uncopyrighted books dealt in throughout the various states and territories of the United States. 387

79. That on or about the 19th day of January, 1907, the American Publishers' Association amended its rules so as to read as follows:

I.—RESOLVED, That the Plan to correct evils connected with the cutting of prices on copyright books adopted at a meeting of the American Pub-

- 388 lishers' Association, held February 17, 1901, together with all votes and resolutions since adopted, amendatory thereof and supplementary thereto, be and the same hereby are rescinded and revoked.

H.—RESOLVED, That the following Plan be adopted by the Association:

AMERICAN PUBLISHERS' ASSOCIATION PLAN.

- 389 (1) That the members of the American Publishers' Association agree that all copyrighted books first issued by them after January 1, 1907 (Excepting School books, subscription books and other books not sold through the trade, and also, if desired, new editions, works of fiction and juveniles) shall be published at net prices; and it is recommended that the retail price of a net book, marked net, be printed on a paper wrapper covering said book. Each member is at liberty to fix such net prices on his copyrighted books as may seem to him proper. The only purpose of this agreement is that the public shall be informed of the real price of each net copyrighted book, which otherwise would be difficult.

- 390 (2) It is recommended to the different members of the Association that each member thereof shall sell his copyrighted books at wholesale only to book dealers and others who will maintain for one year after publication the retail price of his net copyrighted books, and who sell his net copyrighted books (except at retail) to no one who cuts his net prices.

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carry stock of them for public sale.

- (3) Believing that the interests of each individual member of the Association will be furthered by selling his copyrighted books only to booksellers who will allow no greater discount on copyrighted books of fiction (not net) and on copyrighted juvenile books (not net) than 28% during one year after publication, it is rec-

ommended to each member of the Association that he shall act upon this suggestion and that he carry out the same in the manner above suggested in the case of copyrighted net books. The conditions governing the sale of fiction are such that the Association only suggests a maximum discount on retail sales which, however, it is hoped may rarely be given.

391

The purpose of the Association, so far as it can accomplish such purpose by recommendation, is to secure plainly stated prices of net copyrighted books, and to bring the actual selling price of copyrighted books nearer the stated price as far as reasonably and fairly possible; and to avoid special rebates and discounts and to provide for equality in the treatment of retail purchasers.

392

(4) Nothing contained in the foregoing recommendations shall be considered as applicable to sales made to libraries, although it is recommended that libraries be allowed a discount of not more than 10 per cent. on net books or 33 1-3 per cent. on copyrighted fiction and juveniles (not net). By libraries is meant libraries to which access is either free or by annual subscription. Book Clubs are not meant to be included in this description.

(5) It is suggested that a publisher of net copyrighted books selling the same at retail should add to his retail price the cost of postage or expressage when books are sent out of the city where he does business.

393

(6) It is recommended to each member of the Association that he shall not offer nor sell his copyrighted books to anyone who offers such copyrighted books in combination with periodicals at less than the trade subscription price of such periodicals, plus the net or minimum retail price of such copyrighted books.

(7) Nothing contained herein shall be taken as applicable to any book after the expiration of a year from its publication.

(8) Nothing in the above recommendations shall be considered in the nature of an agreement, and no penalty shall attach to a disregard of any of them.

394 (9) The directors of the Association are authorized to establish and maintain an office and engage a suitable person as manager who shall act as an assistant to the secretary and perform such duties as shall be assigned to him by the directors.

80. That since such time the cut-off lists theretofore issued by the American Publishers' Association were not withdrawn.

81. That the name of the plaintiff's still appears on such cut-off lists.

395 82. That the American Publishers' Association still continues to issue its cut-off lists and that its manager still continues to look after its affairs.

83. That it was the duty of such manager since May 1st, 1901, and up to the time of the trial to ascertain whether any dealer did not obey the rules and regulations of the two associations, and whether any dealer furnished books to anyone in violation of the rules.

84. That the American Booksellers' Association still continues since that time to issue its cut-off lists, and that said dealers refuse to supply plaintiffs with books of any kind.

396 85. That since said amendment has been adopted the plaintiffs sought to purchase copyrighted books from the American News Company. That after consultation with the manager of the American Publishers' Association said American News Company refused to sell such copyrighted books to the plaintiff.

86. That both the said associations and their respective members continue the same course as to the sale of copyrighted books as had been established prior to the adoption of such resolution.

87. That the resolutions and agreements of the American Publishers' Association and its members were not agreements between the owners of the respective copyrights and their respective licensees. 397

88. That the plaintiffs refused to become parties to any agreements to maintain the price of copyrighted books and that they were not parties to any such agreement.

89. That the agreements and resolutions of the American Publishers' Association were entered into between the owners of separate copyrights, by which each respectively agreed not to sell or supply his copyrighted books to anyone who did not maintain the price of books published under his copyrights or under the copyrights owned by any other member of the American Publishers' Association. 398

90. That since April 1st, 1904, the rules of the two associations provided, and their respective members agreed not to sell any copyrighted books, whether published by any of the members of the two associations or not, whether issued under the net price system or not, to anyone who did not obey the rules of the two associations or whose name appeared on the cut-off lists of the two associations. 399

91. Prior to the formation of the American Publishers' Association, books were sold at retail either at the list prices or at lower prices, which varied in different shops and were subject to discounts, which sometimes varied with the different purchasers.

92. Retail booksellers throughout the country were injuriously affected by the competition of department stores and mail order houses.

400 93. The plaintiffs have for years been accustomed to sell new copyrighted books and other articles in their book department at low prices and to advertise widely that their prices for books were lower than those of any other dealer.

94. For more than twenty-two years and until within a year of the trial, the plaintiffs have sold the Century Magazine for twenty-five cents a copy, although plaintiff paid the American News Company twenty-eight cents for each copy, and have sold Harpers Magazine for twenty-four cents a copy, for which they paid twenty-seven cents a copy.

401 95. At times to meet competition, plaintiffs have sold new copyrighted books at retail for less than the price paid by them and less than the lowest wholesale price at which said books were sold and have advertised such sales.

96. In December, 1902, the plaintiffs published advertisement as follows:

“Books:

Thanks to the publishers for tying competitors ‘hand and foot’, even if they do offer value to the tied ones *by refusing to sell us*.

402 We particularly enjoy the opportunity of being able to have this illustration made with merchandise on which the ‘difference of quality’ expedient cannot be used as an excuse for higher prices.

The trust has the pledge of all other dealers not to sell the following popular books for less than \$1.08.

Our price 98 cents, our price.

(Here follows list of names.)

“However Books do not convey a just notion of the economy of Macy prices in general, as compared to other stores. On other lines,—the ones more difficult for inexperienced to judge of qualities—the price differ-

ences in our favor are much greater. Sometimes we are a half less than competition. Call it a quarter and you strike a fair average." 403

97. In March, 1902, the plaintiff's published an advertisement, part of which was as follows:

"Read this Everybody.

Competitors, when continually undersold—indulge in unfair and absurd claims. The readiest subterfuge is an attempt to disparage our qualities. When confronted with the fact that our prices are lower than theirs, they invariably try to explain the beat by attacking the character of our goods. How about Books? We use them to illustrate because you *know* Books. They silence criticism. Our rates range from 10 cents to \$1.50 less than others ask for the same books. We save you much more on other lines." 404

98. In November, 1901, the plaintiff's published an advertisement, of which a part was as follows:

"Books are used merely as a peg on which to hang a general story. * * *

"To-day, among other things, we quote Books. How do other dealers, who claim to match our prices explain the differences? In actual dollars and cents they may not appear very large, but the average is about fifteen per cent, in our favor—on Books. 405

Of course other lines show a much greater difference—our prices ranging down to one half less than elsewhere.

However Books are excellent gauges—they are unmistakably alike, and are therefore easily susceptible of comparison. That is our reason why we submit them for your judgment."

1. That the agreements and resolutions of the two associations and their respective members were intended to and did prevent competition in the supply and price of books, copyrighted and uncopyrighted from the first day of May, 1901, to and including the first day of April, 1904.

2. That such agreements and resolutions were unlawful and contrary to the Laws of 1899, Chapter 690, so far as they related to uncopyrighted books.

3. That such agreements and resolutions of the two associations and their respective members so far as they related to uncopyrighted books, constituted an unlawful agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of an article or commodity of common use was or may have been created, established or maintained.

4. That thereby competition in this state in the supply or price of such article or commodity was or may have been restrained or prevented, and that for the purpose of creating, establishing or maintaining a monopoly within this state in the manufacture, production or sale of such article or commodity the free pursuit in this state of the lawful business of selling books at retail was or may have been restricted or prevented.

5. The agreement and rules of the American Publishers' Association were not unlawful so far as they related to copyrighted books published by members of the Association.

6. The acts of the American Publishers' Association and of the defendants publishers were not unlawful, so far as they related to copyrighted books published by members of the Association.

7. No agreement or combination to which the American Booksellers' Association or its members have been parties has been unlawful so far as it related to copyrighted books. 409

8. No acts of the American Booksellers' Association or of any of its members have been illegal so far as they have related to copyrighted books.

9. The plaintiffs are not entitled to an injunction restraining the defendants from acts set forth in the complaint so far as such acts relate to copyrighted books published by them.

11. The plaintiffs are not entitled to recover damages for the acts of the defendants so far as the same related to copyrighted books. 410

12. Plaintiffs are not entitled to an injunction restraining the defendants Walcott, individually, and as President of the American Booksellers' Association, a voluntary unincorporated Association, Joseph W. Nichols, individually and as Secretary of the American Booksellers' Association and J. Wilson Hart, individually, and as Treasurer of the American Booksellers' Association or either of them from acts set forth in the complaint so far as such acts relate to copyrighted books.

13. Plaintiffs are entitled to recover no damages for the acts of the American Booksellers' Association or its members so far as they related to copyrighted books. 411

14. The plaintiffs are entitled to judgment.

I.—Restraining interference with their purchases or sale of uncopyrighted books.

II.—To such damages in the purchase or sale of books as they may have suffered by reason of the unlawful combination entered into by the de-

412 defendants on the 13th day of February, 1901, from May 1st, 1901, and that a referee be appointed to ascertain the amount of such damages.

III.—That the plaintiffs are entitled to costs to be taxed by the clerk of this court and an extra allowance.

VICTOR J. DOWLING,
Justice of the Supreme Court
of the State of New York.

413

414

Interlocutory Judgment.

415

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

ISIDOR STRAUS and NATHAN STRAUS compos-
ing the firm of R. H. MACY & COMPANY,
Plaintiffs,

against

AMERICAN PUBLISHERS' ASSOCIATION,
George S. Emory, D. Appleton & Com-
pany; American News Company; Henry
B. Barnes, doing business as A. S.
Barnes & Company; Brentano's, Cen-
tury Company, Henry T. Coates and
Edward J. Scott, co-partners doing
business under the firm name of H. T.
Coates & Company; Thomas Y. Crowell,
E. Osborne Crowell, T. Irving Crowell,
and J. Osborne Crowell, co-partners
doing business under the firm name of
Thomas Y. Crowell & Company; G. W.
Dillingham Company; Frank H. Dodd,
Bleecker Van Wagnen and Robert H.
Dodd, co-partners, doing business under
the firm name of Dodd, Mead & Com-
pany; Doubleday, Page & Company; E.
P. Dutton & Company, Funk & Wagnalls
Company, Harper & Brothers, Henry
Holt and Charles Holt, co-partners, do-
ing business under the firm name of
Henry Holt & Company; George H.
Mifflin, James M. Kay, Henry A. Hough-
ton, Oscar R. Houghton, Albert F.
Houghton, Lucy H. Valentine, co-part-
ners, doing business under the firm name
of Houghton, Mifflin & Company; Mc-
Clure, Philips & Company, Macmillan
Company, New Amsterdam Book Com-
pany, James Pott and James Pott, Jr.,

416

417

- 418 co-partners, doing business under the firm name of James Pott & Company; G. P. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, co-partners, doing business under the firm name of J. F. Taylor & Company, Adolph Wessels, doing business as A. Wessels Company, Clarence E. Walcott, individually and as President of the American Booksellers' Association, a voluntary unincorporated Association, Joseph W. Nichols, individually and as Secretary of the American Booksellers' Association, J. Wilson Hart, individually and as Treasurer of the American Booksellers' Association, Baker & Taylor Company, Fleming H. Revell Company and William R. Jenkins,
- 419
- Defendants.

This action having come on for trial before me, one of the Justices of the Supreme Court, at a Special Term of said Court held at Part III thereof on the 13th, 14th, 16th, 17th, 20th, 21st and 23rd days of May, 1907, and the plaintiffs by their

420 counsel John G. Carlisle, Esq., and Edmond E. Wise, Esq., having duly presented their proofs, and the defendants, the American Publishers' Association and such defendants as are designated as publishers in paragraph III of the complaint, having submitted their proofs by Stephen H. Olin, Esq., their counsel, and the defendant the American Booksellers' Association, and the defendants designated as booksellers in paragraph V of the complaint, having appeared and submitted their proofs by Thaddeus D. Kenneson, Esq., their counsel,

Now on reading and filing the pleadings, papers and proceedings herein, and after due deliberation, and it appearing to my satisfaction that the material allegations of the complaint have been established by the proof and that the contract, arrangement or combination set forth is unlawful, so far as it relates to uncopyrighted books, and in contravention of the statute in such case made and provided, it is

421

ORDERED, ADJUDGED AND DECREED that the defendants and each of them, their officers, agents, attorneys or servants be and they are hereby enjoined and restrained from interfering in any manner whatsoever with the purchase by the plaintiffs of uncopyrighted books at wholesale or retail; that the defendants and each of them, their officers, agents, attorneys and servants be and they hereby are enjoined and restrained from circulating or publishing any blacklists or cut off lists whose object is to interfere with the purchase by the plaintiffs of uncopyrighted books or to threaten, coerce or intimidate any person, firm or individuals whatsoever who deal or may desire to deal with the plaintiffs in the purchase of uncopyrighted books;

422

423

FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs are entitled to recover damages from the defendants and each of them which they have sustained in any manner whatsoever by reason of the defendants' unlawful acts in the premises; that for the purpose of ascertaining such damage Edward D. O'Brien, Esq., of No. 120 Broadway, attorney and counsellor at law, be and he hereby is appointed Referee to take proof of such damages and report the same with his conclusions to this Court;

424 FURTHER ORDERED, ADJUDGED AND DECREED that upon the coming in of such report and the confirmation thereof by this Court that the amount so found to be due to the plaintiffs shall be added to the foot of this judgment and shall be made a part thereof, and that the plaintiffs shall have execution therefor.

FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs in addition are entitled to costs and disbursements to be taxed by the Clerk of this Court together with an extra allowance, the amount whereof shall be determined by and in the
425 Final Judgment herein;

FURTHER ORDERED, ADJUDGED AND DECREED that any of the parties hereto may apply at the foot of this judgment for such further directions for the execution thereof as may be proper.

Enter

V. J. D.,

J. S. C.

Plaintiff's Requests to Find.

427

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

ISIDOR STRAUS and NATHAN STRAUS compos-
ing the firm of R. H. MACY & COMPANY,
Plaintiffs,

against

AMERICAN PUBLISHERS' ASSOCIATION,
George S. Emory, D. Appleton & Com-
pany; American News Company; Henry
B. Barnes, doing business as A. S.
Barnes & Company; Brentano's, Cen-
tury Company, Henry T. Coates and
Edward J. Scott, co-partners doing
business under the firm name of H. T.
Coates & Company; Thomas Y. Crowell,
E. Osborne Crowell, T. Irving Crowell,
and J. Osborne Crowell, co-partners
doing business under the firm name of
Thomas Y. Crowell & Company; G. W.
Dillingham Company; Frank H. Dodd,
Bleecker Van Wagnen and Robert H.
Dodd, co-partners, doing business under
the firm name of Dodd, Mead & Com-
pany; Doubleday, Page & Company; E.
P. Dutton & Company, Funk & Wagnalls
Company, Harper & Brothers, Henry
Holt and Charles Holt, co-partners, do-
ing business under the firm name of
Henry Holt & Company; George H.
Mifflin, James M. Kay, Henry A. Hough-
ton, Oscar R. Houghton, Albert F.
Houghton, Lucy H. Valentine, co-part-
ners, doing business under the firm name
of Houghton, Mifflin & Company; Mc-
Clure, Phillips & Company, Macmillan
Company, New Amsterdam Book Com-

428

429

- 430 pany, James Pott and James Pott, Jr., co-partners, doing business under the firm name of James Pott & Company; G. P. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, co-partners, doing business under the firm name of J. F. Taylor & Company, Adolph Wessels, doing business as A. Wessels Company, Clarence E. Walcott, individually and as President of the American Booksellers' Association, a voluntary unincorporated Association, Joseph W. Nichols, individually and as Secretary of the American Booksellers' Association, J. Wilson Hart, individually and as Treasurer of the American Booksellers' Association, Baker & Taylor Company, Fleming H. Revell Company, William R. Jenkins,
- 431

Defendants.

To the Honorable VICTOR J. DOWLING, Justice.

PLAINTIFFS' REQUEST TO FIND.

432

The above-entitled action having come on for trial at Special Term, Part III, before Mr. Justice Victor J. Dowling, without a jury, on the 13th day of May, 1907, and the respective parties having submitted their proofs and the said trial having been concluded on the 23rd day of May, 1907, the plaintiffs hereby request the Court to make the following findings of fact and conclusions of law:

FINDINGS OF FACT.

433

1. That prior to the 1st day of May, 1901, the plaintiffs were and still are co-partners in business and conducting a retail department store in the city of New York, Borough of Manhattan, under the firm name and style of R. H. Macy & Company.—*Found.*

2. That among other departments in their said store the plaintiffs conducted a department for the retail sale of books of all kinds, copyrighted and uncopyrighted, and that such retail sale of books in said department amounts to about \$250,000 a year (Kinneer, page 586).—*Found.* 434

3. That the American Publishers' Association, one of the defendants, is a domestic corporation, organized on the 31st day of December, 1900 (Exhibit 5, page 62). *Found; see defts. finding.*

4. That the members of said American Publishers' Association were corporations, firms and individuals engaged in the business of publishing copyrighted and uncopyrighted books, and selling the same at wholesale or retail or both throughout the various States and Territories of the United States including the State of New York (List of members American Publishers' Association, Exhibit 22, page 127. As to dealings at retail see letter Nichols, Exhibit 9, page 99).—*Found.* 435

5. That only publishers of books were eligible to membership in said Publishers' Association (By-Laws, Exhibit 97, page 507).—*Found.*

6. That the corporations, firms and individuals enumerated in Paragraph III of the complaint and designated as publishers were amongst the members of said American Publishers' Association.—*Found.*

436 7. That the membership of said American Publishers' Association included almost all the well-known publishers (See letter Scribner, dated August 8, 1902, pages 727-8), who did, probably, 75% of the publishing business not only in the State of New York, but in the whole United States (Emory, page 223), both in copyrighted and uncopyrighted books (See also List A and List B, submitted by defendants after the conclusion of the trial; also Exhibit No. 126, page 595, page 598, also page 627).—*Found.*

437 8. That a number of the members of the American Publishers' Association published and sold only Bibles or uncopyrighted books (See Emory, page 629, *et seq.*).—*Found.*

9. That a number of the members of the said American Publishers' Association published both copyrighted and uncopyrighted books (See lists submitted by defendants after close of case).—*Found.*

438 10. That the defendant the American Booksellers' Association is a voluntary unincorporated association, composed of wholesale and retail booksellers throughout the states and territories of the United States, including the State of New York, and that a number of publishers were also members of the American Booksellers' Association (see Exhibit 32, page 160). The firms, corporations and individuals mentioned in the fifth paragraph of the complaint are amongst the members of the said American Booksellers' Association.—*Found. See defts. findings also.*

11. That the membership of the American Booksellers' Association included the large majority in numbers and in extent of business of both the wholesale and retail book trade (see list attached to Exhibit 58, page 266, compare with

trade lists Exhibit 54, page 228 which lists include practically the whole trade).—*Found*. 439

12. That the members of said Association dealt in copyrighted and uncopyrighted books.—*Found*.

13. That the plaintiffs refused to become a member of the American Booksellers' Association or to abide by its rules (Kinnear, page 680).—*Found*.

14. That prior to May, 1901, it was customary to sell books at retail at so-called list prices, list price being the published price from which the retailer allowed various discounts to various people (Emory, 209).—*Found*. 440

15. That the plaintiffs in their book department did not sell books at list prices, but at a fixed price without any discount (Kinnear, page 677).—*Found*.

16. That during the Spring and Fall of 1900 a number of prominent publishers and a number of booksellers conferred together for the purpose of concerted action looking towards the maintenance of a fixed price by all dealers in copyrighted books (Ex. 21, page 119; Scribner, page 732).—*Found*.

17. That thereafter an organization committee of publishers was appointed which communicated with various booksellers throughout the United States and invited answers to various questions concerning the establishing of a fixed price and the preventing of competition in the sale of copyright books (Exhibit 2, 3, October, 1900).—*Found*. 441

18. That thereafter the American Publishers' Association was formed which, on February 13, 1901, adopted a resolution and all its members agreed to observe such resolution and to be bound thereby. Said resolution is correctly set forth as

442 Exhibit A annexed to the answer of the American Publishers' Association.—*Found.*

19. That thereafter the American Booksellers' Association, with the approval of the American Publishers' Association, adopted a resolution and its members entered into agreements to co-operate with the Publishers' Association and its members in the maintenance of said net price system, which said resolution or agreement, known as Reform Resolution No. 1 is correctly set forth as Exhibit II annexed to the answer of the defendant American Booksellers' Association (Exhibit 87).—*Found.*

443 20. That said resolutions and agreements were put into effect on the first day of May, 1901. That since the time of the adoption of said resolutions the two associations and its various members continually combined and co-operated to carry into effect the rules, regulations and agreements adopted by said two associations and their respective members.—*Found.*

21. That since May 1st, 1901, the majority of copyrighted books were published at net prices; that is, at prices from which no discounts were allowed, pursuant to the rules of the Publishers' Association.—*Found.*

444 22. That thereafter a large majority of all dealers throughout the various states of the United States in accordance with the rules and regulations and by agreements with the aforesaid associations maintained such net prices on copyrighted books and that competition in the prices of such net copyrighted books at retail was thereby almost completely destroyed. *Found.*

23. That the defendant associations and their various members gave information to the respective associations to which they belonged

whenever they discovered the cutting of prices of net copyrighted books or competition in the sale thereof at retail, and if such fact was established the American Publishers' Association issued a list to the members of the American Publishers' Association and to the large jobbing houses directing them to discontinue the sale of any books of any kind, whether copyrighted or uncopyrighted to the offender, and such directions were obeyed. *Found.* 445

24. That such list was furnished to the American Booksellers' Association and was published in the monthly report of the Secretary of said association and sent to all the trade under the head of "Dealers whose supplies have been cut off." *Found.* 446

25. That the said American Publishers' Association further investigated in case any dealer or publisher sold books of any kind whether copyrighted or uncopyrighted to an offender so placed on such cut-off lists, and if it was found that any dealer or publisher had furnished books to an offender whether copyrighted or uncopyrighted, such publisher or dealer was likewise placed upon the cut-off list which thereafter was sent to members of the Publishers' Association and published in the monthly report of the Secretary of the Booksellers' Association and circulated among the trade at large. *Found.* 447

26. That the American Publishers' Association furthermore circulated a so-called list No. 2 which contained the names of dealers who were suspected of intending to sell to so-called price-cutters, meaning thereby persons who refused to maintain prices on net copyrighted books and members of the American Publishers' Association and wholesale jobbers were warned not to sell

448 any books of any kind whether copyrighted or un-
copyrighted to any individuals on said list until
they had signed an agreement to abide by the
rules and regulations of the American Publishers'
Association, such agreement being an agreement
with the American Publishers' Association as set
forth as Exhibit , at page , as follows:
Found.

"AMERICAN PUBLISHERS' ASSOCIATION.

In consideration of discount allowed on
books bought from—
449 we hereby agree that for one year from date
of publication we will not sell net books at less
than the retail prices fixed by the respective
publishers, nor fiction published after Febru-
ary 1, 1902, at a greater discount than 28 per
cent at retail, as provided by the rules of The
American Publishers' Association. We fur-
ther agree that we will not sell books pub-
lished by members of the American Publish-
ers' Association to any dealer known to us to
cut prices of net books or of new fiction, ex-
cept as provided above."

27. That said list of suspected dealers was cir-
culated amongst members of the American Pub-
lishers' Association and also jobbers or whole-
450 salers in books and was observed and obeyed by
them. *Found.*

28. That the American Booksellers' Association
and its members co-operated with the American
Publishers' Association and its members in the
maintenance of the said net price system and the
enforcement of its rules and obeyed and enforced
all the rules and regulations of said two associa-
tions. *Found.*

29. That its secretary published a monthly re-
port circulated to the trade, which contained the

lists of persons, firms and corporations who were not to be supplied with books of any kind whatsoever issued by the members of the American Publishers' Association, and that any dealer who supplied books to any one mentioned in said list was likewise cut off from his supply of books. *Found.*

451

30. That the publishers of any copyrighted or uncopyrighted books who failed or neglected to become members of the American Publishers' Association and to abide by its rules as to the sale of books to appropriate persons were invited to join by the American Booksellers' Association. *Found.*

452

31. That by special agreement entered into with the organization committee of the American Publishers' Association the members of the American Booksellers' Association were bound not to buy, not to put in stock nor to offer for sale the books of any publisher who shall have finally declined to co-operate in the maintenance of the net price system by joining the American Publishers' Association and issuing books under the net price system (Exhibit 60, page 608). *Found.*

32. That said publishers of uncopyrighted books were informed that all booksellers were pledged not to deal in and not to handle the books of any firm, individual or corporation that published books, either copyrighted or uncopyrighted that did not co-operate with the American Publishers' Association (See report of convention June, 1902, Exhibit 126, page 595).—*Found.*

453

33. That said publishers of uncopyrighted books were informed by the American Booksellers' Association that co-operation with the American Publishers' Association could only be

454 maintained through joining the American Publishers' Association and abiding by all its rules and regulations (See report of convention June, 1902, *idem*).—*Found*.

34. That thereafter a number of such publishers did join such association and obeyed all its rules and regulations, and that several who did not join were placed on the cut off lists and the rules were applied to them.—*Found*.

455 35. That under and pursuant to various resolutions, regulations and agreements entered into by said two associations and their respective members any retail dealer who failed to maintain the net price or any wholesale dealer who supplied books to such a dealer were cut off from their supply of books of any and all kinds whether copyrighted or uncopyrighted and were thereafter unable to buy books of any kind in the ordinary or usual method.—*Found*.

36. That on or about the 1st day of May, 1901, the plaintiff sold the copyrighted book "Tarry Thou Till I Come," at \$1.24 per volume.—*Found*.

456 37. That said book had been published by the Funk & Wagnalls Company at the net price of \$1.40.—*Found*.

38.—That the plaintiffs refused the request of the American Publishers' Association to sell said book at the net price.—*Found*.

39. That thereafter a letter was issued by the American Publishers' Association to its members directing them to discontinue the sale of any and all books to R. H. Macy & Company, the plaintiffs herein.—*Found*.

40. That thereafter the American Booksellers' Association issued a cut-off list containing the

name of R. H. Macy & Company (Exhibits 55, 56, 457
page 235).—*Found*.

41. That the ordinary rate of discount on the wholesale sale of books was 40% from the list price and in quantities 40 and 5% discount from the list price and in larger quantities 40 and 10% discount from the list price (Emory, page 211) and an additional discount for cash (Kinnear, pages 676, 677).—*Found*.

42. That the discount at wholesale for net books after May, 1901, was 25%, with additional discount for larger quantities, and on restricted books the same as theretofore.—*Found*.

458

43. That thereafter the plaintiffs in the ordinary course of business were unable to secure a supply of books for their department, except in unusual ways.—*Found*.

44. That the plaintiffs continued to sell books of the same character, size and style at the same prices after May 1st, 1901, as prior to that time.—*Found*.

45. That in each instance such price was less than the net price fixed by the publishers for copyrighted books.—*Found*.

46. That the so-called \$1.50 book was sold by 459
R. H. Macy & Company at 98 cents prior to the first day of May, 1901, and that after that date the so-called \$1.50 book was sold at 98 cents.—*Found*.

47. That the net or restricted price for a book formerly known as a \$1.50 book was about \$1.08.—*Found*.

48. That from the first week in May, 1901, till February, 1904, under and pursuant to the rules of the defendant associations and the agreements of its members, R. H. Macy & Company were unable to purchase supplies of books for their book

460 department in the ordinary course of business and with the customary discounts. That during said period the two associations sought by all means in their power, including the employment of detectives to ascertain the sources of plaintiffs' book supply, and whenever they did so ascertain it the persons who sold books to the plaintiffs, whether they were members of either association or not were placed upon the cut-off lists and were in turn deprived of the power to buy books in the ordinary and usual course, and with the customary discounts.—*Found.*

461 49. That in some instances individuals and dealers in books who had supplied R. H. Macy & Company were wholly ruined and driven out of business.—*Found.*

50. That the American Booksellers' Association widely circulated the names of such dealers who had been so driven out of business and warned dealers, whether members of either association or not to avoid the fate of such booksellers (See Circular, Sept. 30, 1901).—*Found.*

462 51. That various circulars were issued to the trade at large including members and non-members of both associations by both said associations warning all persons against dealing with these plaintiffs or any other so-called price-cutters.—*Found.*

52. That in 1902, the American Publishers' Association at the request of the American Booksellers' Association modified its rules and regulations so as to provide that works of fiction could be sold at a restricted price, meaning thereby that the former list price was re-established with a maximum discount amount set forth.—*Found.*

53. That such maximum discount was 28% so that the sale of the so-called \$1.50 book could be

had at any price between \$1.08 and \$1.50 and that a sale at less than \$1.08 would be punished by the associations as price-cutting on copyrighted books.—*Found.*

463

54. That the plaintiffs sold said \$1.50 book at a minimum price of 98c and continued so to do.—*Found.*

55. That other books were sold by the plaintiffs at retail to the public at less than either the restricted or net price, and that until the time of the trial the plaintiffs continued to sell books at retail at less than the net or restricted price fixed by the publishers and maintained under the rules and regulations of the said two associations.—*Found.*

464

56. That thereafter and on or about the 1st of April, 1904, the American Publishers' Association amended its rules and regulations in various respects, more especially by providing that such rules and regulations should apply only to the sale of copyrighted books. A copy of such resolution is correctly set forth as Exhibit G annexed to the answer of the American Publishers' Association.—*Found.*

57. That thereafter the American Booksellers' Association adopted Reform Resolution No. 2, which is correctly set forth as Exhibit I annexed to the answer of the Booksellers' Association, which purports to restrict the operation of the rules to the sale of copyrighted books.—*Found.*

465

58. That thereafter the said two associations and their respective members continued the same methods as to ascertaining the plaintiffs' supply of copyrighted books, of cut-off lists and of circulars to the trade which had been adopted by them prior to the amendment of the resolutions and agreements in April, 1904.—*Found.*

466 59. That thereafter and until the trial of this action the plaintiffs had been continued on the cut-off lists issued by the respective associations and were unable to secure a supply of copyrighted books in the ordinary course of business and with the customary discounts.—*Found.*

60. That thereafter the plaintiffs continued to purchase copyrighted books in unusual and indirect ways.—*Found.*

467 61. That the copyrighted books covered by the rules included books, the copyrights of which were not owned by members of the American Publishers' Association.—*Found.*

62. That the American Publishers' Association was not the owner and had no interest in the copyrights of any of the books published since the first day of May, 1901, or prior thereto.—*Found.*

63. That the American Booksellers' Association was not the owner of, and had no interest in the copyrights of any of the books published since the first of May, 1901, or prior thereto.—*Found.*

468 64. That the members of the American Booksellers' Association who were not publishers, were not the owners of, and had no interest in the copyrights of any books published since the first of May, 1901, or prior thereto.—*Found.*

65. That the members of the American Publishers' Association were each sole owners of the copyrights of the books published by them respectively.—*Found.*

66. That none of the copyrights of the books published were owned by any other firm or individual than the one to which such member belonged.—*Found.*

67. That the members of the said two associations resided in and carried on their business of

selling books in many different states of the United States, and were engaged in the business of purchasing books, copyrighted and uncop- 469
 righted from each other and from other persons in many states other than the state in which the purchaser resided and did business.—*Found.*

68. That the rules, regulations and agreements of the said two associations and their respective members were applied and enforced from the first day of May, 1901, as from time to time amended, against all publishers and dealers in books throughout the different states of the United States, whether such publishers and dealers were or were not members of either of such associations and whether they purchased books in one state for 470
 transportation and delivery in another or for delivery in the state where purchased.—*Found.*

69. That the members of the said two associations have heretofore purchased, distributed and sold since the first day of May, 1901, and still purchase, distribute and sell at wholesale and retail the large majority of all copyrighted and of all uncopyrighted books dealt in throughout the various states and territories of the United States.—*Found.*

70. That on or about the 19th day of January, 471
 1907, the American Publishers' Association amended its rules so as to read as follows: *Found.*

I.—RESOLVED, That the Plan to correct evils connected with the cutting of prices on copyright books adopted at a meeting of the American Publishers' Association, held February 13, 1901, together with all votes and resolutions since adopted, amendatory thereof and supplementary thereto, be and the same hereby are rescinded and revoked.

- 472 H.—RESOLVED, That the following Plan be adopted by the Association:

AMERICAN PUBLISHERS' ASSOCIATION PLAN.

- 473 (1) That the members of the American Publishers' Association agree that all copyrighted books first issued by them after January 1, 1907 (Excepting School books, subscription books and other books not sold through the trade, and also, if desired, new editions, works of fiction and juveniles), shall be published at net prices; and it is recommended that the retail price of a net book, marked net, be printed on a paper wrapper covering said book. Each member is at liberty to fix such net prices on his copyrighted books as may seem to him proper. The only purpose of this agreement is that the public shall be informed of the real price of each net copyrighted book, which otherwise would be difficult.

(2) It is recommended to the different members of the Association that each member thereof shall sell his copyrighted books at wholesale only to book dealers and others who will maintain for one year after publication the retail price of his net copyrighted books, and who sells his net copyrighted books, (except at retail) to no one who cuts his net prices.

- 474 A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carry stock of them for public sale.

(3) Believing that the interests of each individual member of the Association will be furthered by selling his copyrighted books only to booksellers who will allow no greater discount on copyrighted works of fiction (not net) and on copyrighted juvenile books (not net) than 28 per cent. during one year after publication, it is recommended to each member of the Association that he shall act upon this suggestion and that he carry out the same in the manner above suggested in the case of copyrighted net books. The conditions governing the sale of fiction are such that

the Association only suggests a maximum discount on retail sales which, however, it is hoped may rarely be given.

475

The purpose of the Association, so far as it can accomplish such purpose by recommendation, is to secure plainly stated prices of net copyrighted books and to bring the actual selling price of copyrighted books nearer the stated price as far as reasonably and fairly possible; and to avoid special rebates and discounts and to provide for equality in the treatment of retail purchasers.

(4) Nothing contained in the foregoing recommendations shall be considered as applicable to sales made to libraries, although it is recommended that libraries be allowed a discount of not more than 10 per cent. on net books or 33 1-3 per cent. on copyrighted fiction and juveniles (not net). By libraries is meant libraries to which access is either free or by annual subscription. Book Clubs are not meant to be included in this description.

476

(5) It is suggested that a publisher of net copyrighted books selling the same at retail should add to his retail price the cost of postage or expressage when books are sent out of the city where he does business.

(6) It is recommended to each member of the Association that he shall not offer nor sell his copyrighted books to anyone who offers such copyrighted books in combination with periodicals at less than the trade subscription price of such periodicals, plus the net or minimum retail price of such copyrighted books.

477

(7) Nothing contained herein shall be taken as applicable to any book after the expiration of a year from its publication.

(8) Nothing in the above recommendations shall be considered in the nature of an agreement, and no penalty shall attach to a disregard of any of them.

(9) The directors of the Association are authorized to establish and maintain an office and engage a suitable person as manager who shall act as an

478 assistant to the secretary and perform such duties as shall be assigned to him by the directors.

71. That since such time the cut-off lists theretofore issued by the American Publishers' Association were not withdrawn. *Found.*

72. That the name of the plaintiffs still appears on such cut-off lists. *Found.*

73. That the American Publishers' Association still continues to issue its cut-off lists and that its manager still continues to look after its affairs. *Found.*

479 74. That it was the duty of such manager since May 1st, 1901, and up to the time of the trial to ascertain whether any dealer did not obey the rules and regulations of the two associations, and whether any dealer furnished books to anyone in violation of the rules. *Found.*

75 That the American Booksellers' Association still continues since that time to issue its cut-off lists and that said dealers refuse to supply plaintiffs with books of any kind.—*Found.*

480 76. That since said amendment has been adopted the plaintiffs sought to purchase copyrighted books from the American News Company. That after consultation with the manager of the American Publishers' Association said American News Company refused to sell such copyrighted books to the plaintiff.—*Found.*

77. That both the said associations and their respective members continue the same course as to the sale of copyrighted books as had been established prior to the adoption of such resolution.—*Found.*

78. That the resolutions and agreements of the American Publishers' Association and its

members were not agreements between the owners of the respective copyrights and their respective licensees.—*Found.* 481

79. That the plaintiffs refused to become parties to any agreements to maintain the price of copyrighted books and that they were not parties to any such agreement.—*Found.*

80. That the agreements and resolutions of the American Publishers' Association were entered into between the owners of separate copyrights by which each respectively agreed not to sell or supply his copyrighted books to anyone who did not maintain the price of books published under his copyrights or under the copyrights owned by any other member of the American Publishers' Association.—*Found.* 482

81. That since April 1st, 1904, the rules of the two associations provided and their respective members agreed not to sell any copyrighted books, whether published by any of the members of the associations or not, whether issued under the net price system or not, to anyone who did not obey the rules of the two associations or whose name appeared on the cut-off lists of the two associations.—*Found.* 483

CONCLUSIONS OF LAW.

I.—That the agreements and resolutions of the two associations and their respective members were intended to and did prevent competition in the supply and price of books, copyrighted and uncopyrighted from the first day of May, 1901, to and including the first day of April, 1904.—*Found.*

II.—That such agreements and resolutions were wholly unlawful and contrary to the Laws of

- 484 1899, Chapter 690.—*Found as amended.* Amended by striking out the word "wholly" and adding at the end, "So far as they related to uncopied books."

III.—That such agreements and resolutions of the two associations and their respective members constituted an unlawful agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of an article or commodity of common use was or may have been created, established or maintained.
 485 —*Found as amended.* Amended by adding "So far as they related to uncopied books" after the words "respective members."

IV.—That thereby competition in this State in the supply or price of such article or commodity was or may have been restrained or prevented, and that for the purpose of creating, establishing or maintaining a monopoly within this state in the manufacture, production or sale of such article or commodity the free pursuit in this state of the lawful business of selling books at retail was or may have been restricted or prevented.—
 486 *Found.*

V.—That the agreements, resolutions or combinations set forth in the complaint affected Interstate commerce and were unlawful, illegal and contrary to the statutes of the United States and more particularly of the statute passed on the 2nd day of July, 1890, known as An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, and set forth in full at page 762 of Volume I of Supplement to the Revised Statutes of the United States.—*Not found.*

VI.—That the resolutions of the American Publishers' Association as amended April 1st, 1904, and the similar resolution of the American Booksellers' Association known as Reform Resolution No. 2, and the various agreements of the Publishers and Booksellers with reference thereto purporting to restrict the operations of the combination, agreement or arrangement entered into to copyrighted books was likewise wholly unlawful and contrary to the aforementioned Statute of the State of New York.—*Not found.*

487

VII.—That such resolutions and agreements purporting to restrict the effect of the combination, arrangement or contracts to copyrighted books likewise affect an article of interstate commerce and was unlawful and contrary to the aforementioned statute of the United States as being in restraint to interstate commerce and tending to create a monopoly.—*Not found.*

488

VIII.—That the owners of several separate copyrights are not empowered to enter into any contract or agreement or combination between themselves concerning the supply and price of books published under their separate copyrights which would be unlawful and against the public policy of this state or its statutes if entered into with reference to the supply or price of uncopyrighted books.—*Not found.*

489

IX.—That the owners of several separate copyrights are not empowered to enter into any contract or agreement or combination between themselves concerning the supply and price of books published under their separate copyrights which would be unlawful and contrary to the statutes of the United States against combinations in re-

490 straint of trade or for the purpose of creating a monopoly, if entered into with reference to the supply or price of uncopyrighted books.—*Not found.*

491 X.—That the sole owner of a copyright cannot, after publication and after he has parted with the title to the copyrighted book continue to control the sale of such books by reason of any statutory right granted to him. That such control, if it can be secured at all, must be obtained by contract expressed or implied in the same manner as with uncopyrighted books or any other articles of personal property.—*Not found.*

XI.—The plaintiffs are entitled to judgment.

1. Restraining interference with their purchase or sale of uncopyrighted books.

2. Restraining any interference with their purchase or sale of copyrighted books.

492 3. To such damages in the purchase or sale of books as they may have suffered by reason of the unlawful combination entered into by the defendants on the 13th day of February, 1901, and from May 1st, 1901, to April 1st, 1904, and that a referee be appointed to ascertain the amount of such damages.

4. That the plaintiffs are entitled to recover damages suffered by them in the purchase or sale of copyrighted books from April 1st, 1904, and that a referee be appointed to ascertain the amount of such damages.

5. That the plaintiffs are entitled to costs, to be taxed by the clerk of this court, and an extra allowance.—*Found as amended. Amended by striking out all of paragraphs Nos. 2 and 4.*

Dated, New York, September 17, 1907.

Respectfully submitted,

EDMOND E. WISE,
Attorney for Plaintiffs.

Plaintiffs' Exceptions.

493

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

ISIDOR STRAUS *et al.*,
Plaintiffs,

against

AMERICAN PUBLISHERS' ASSOCIA-
TION *et al.*,
Defendants.

494

This case having come on for trial before Hon. Victor J. Dowling of this Court, without a jury, at Special Term, Part III thereof, and the Court having taken the proofs and heard the counsel for the respective parties hereto, and having filed a decision herein on the 19th day of November, 1907, the plaintiffs herein hereby except to said decision, and more expressly to the following portions thereof, and they further except to the refusal of the Court to make the findings of fact and conclusions of law hereinafter more expressly set forth:

495

I.—These plaintiffs, except to so much of the second conclusion of law as finds that the agreements and resolutions were unlawful and contrary to the Laws of 1899, Chapter 690, only in so far as they related to uncopyrighted books, and that the Court failed to find that they were unlawful and contrary to said statute as to both copyrighted and uncopyrighted books.

496 II.—The plaintiffs except to so much of the third conclusion of law as finds that said agreements and resolutions constituted an unlawful agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this State of an article or commodity of common use was or may have been created, established or maintained only in so far as they related to uncopyrighted books, and that he failed to find the same as to copyrighted books.

497 III.—These plaintiffs except to each and every portion of the fifth conclusion of law.

IV.—These plaintiffs except to each and every portion of the sixth conclusion of law.

V.—These plaintiffs except to each and every portion of the seventh conclusion of law.

VI.—These plaintiffs except to each and every portion of the eighth conclusion of law.

VII.—These plaintiffs except to each and every portion of the ninth conclusion of law.

498 VIII.—These plaintiffs except to each and every portion of the tenth conclusion of law.

IX.—These plaintiffs except to each and every portion of the eleventh conclusion of law.

X.—These plaintiffs except to each and every portion of the twelfth conclusion of law.

XI.—These plaintiffs except to each and every portion of the thirteenth conclusion of law.

XII.—These plaintiffs except to so much of the
fourteenth conclusion of law as fails to direct
judgment restraining interference with the pur- 499
chase or sale of copyrighted books, and to such
portion as limits the recovery of damages in the
purchase and sale of books to uncopyrighted
books only.

These plaintiffs further except to the Court's
failure or refusal to find the following conclusions
of law submitted by the plaintiffs in the proposed
decision:

XIII.—The plaintiffs except to the Court's
refusal to find the proposed conclusion of Law 500
No. II as follows:

“That such agreements and resolutions
were wholly unlawful and contrary to the
Laws of 1899, Chapter 690.”

XIV.—The plaintiffs except to the Court's re-
fusal to find the proposed conclusion of Law No.
III as follows:

“That such agreements and resolutions of
the two associations and their respective
members constituted an unlawful agreement,
arrangement or combination whereby a mon- 501
opoly in the manufacture, production or sale
in this state of an article or commodity of
common use was or may have been created,
established or maintained.”

XV.—The plaintiffs except to the Court's re-
fusal to find the proposed conclusion of Law No.
V as follows:

“That the agreements, resolutions or com-
binations set forth in the complaint affected
interstate commerce and were unlawful,
illegal and contrary to the statutes of the
United States and more particularly of the

502 statute passed on the 2nd day of July, 1890, known as An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, and set forth in full at page 762 of Volume I of Supplement to the Revised Statutes of the United States."

XVI.—These plaintiffs except to the Court's refusal to find the proposed conclusion of Law No. VI, as follows:

503 "That the resolutions of the American Publishers' Association as amended April 1st, 1904, and the similar resolution of the American Booksellers' Association known as Reform Resolution No. 2 and the various agreements of the Publishers and Booksellers with reference thereto purporting to restrict the operation of the combination, agreement or arrangement entered into to copyrighted books was likewise wholly unlawful and contrary to the aforementioned Statute of the State of New York."

XVII.—These plaintiffs except to the Court's refusal to find the proposed conclusion of Law No. VII as follows:

504 "That such resolutions and agreements purporting to restrict the effect of the combination, arrangement or contracts to copyrighted books likewise affect an article of interstate commerce and was unlawful and contrary to the aforementioned statute of the United States as being in restraint of interstate commerce and tending to create a monopoly."

XVIII.—These plaintiffs except to the Court's refusal to find the proposed conclusion of Law No. VIII as follows:

"That the owners of several separate copyrights are not empowered to enter into

any contract or agreement or combination between themselves concerning the supply and price of books published under their separate copyrights which would be unlawful and against the public policy of this state or its statutes if entered into with reference to the supply or price of uncopyrighted books."

505

XIX.—These plaintiffs except to the Court's refusal to find the proposed Conclusion of Law No. IX as follows:

"That the owners of several separate copyrights are not empowered to enter into any contract or agreement or combination between themselves concerning the supply and price of books published under their separate copyrights which would be unlawful and contrary to the statutes of the United States against combinations in restraint of trade or for the purpose of creating a monopoly, if entered into with reference to the supply or price of uncopyrighted books."

506

XX.—These plaintiffs except to the Court's refusal to find the proposed conclusion of Law No. X as follows:

"That the sole owner of a copyright cannot, after publication and after he has parted with the title to the copyrighted book continue to control the sale of such books by reason of any statutory right granted to him. That such control, if it can be secured at all, must be obtained by contract expressed or implied in the same manner as with uncopyrighted books or any other articles of personal property."

507

XXI.—These plaintiffs except to the failure of the Court to find the following portions of the proposed conclusion of Law No. XI as follows:

508

"1. Restraining interference with their purchase or sale of uncopyrighted books.

2. Restraining any interference with their purchase or sale of copyrighted books.

4. That the plaintiffs are entitled to recover damages suffered by them in the purchase or sale of copyrighted books from April 1st, 1904, and that a referee be appointed to ascertain the amount of such damages."

Dated New York, November 25th, 1907.

Yours, etc.,

509

EDMOND E. WISE,

Attorney for Plaintiffs,

19 William Street,

New York City.

To Hon. PETER J. DOOLING,

The Clerk of the County of New York;

STEPHEN H. OLIN, Esq.,

Attorney for Defendants American Publishers' Association *et al.*;

510

KENNESON, CRAIN, EMLEY & RUBINO, Esqs.,

Attorneys for Defendants American Booksellers' Association *et al.*

Opinion of Mr. Justice Dowling.

511

SUPREME COURT,

NEW YORK COUNTY.

ISIDOR STRAUS and ano.,
Plaintiff,

vs.

AMERICAN PUBLISHERS' ASSOCIA-
TION *et al.*,
Defendants.

512

A careful examination of the testimony and exhibits herein leads me to the conclusion that it is impossible to differentiate the legal propositions now presented for determination from those which were judicially settled by the Court of Appeals by its prior decision herein, and which were raised by demurrer (177 N. Y., 473). The question is not one of the interpretation of the copyright laws of the United States, and, therefore the contention of plaintiffs' counsel that the decision of the United States Circuit Court of Appeals for the Second Circuit should supersede that of the Court of Appeals is incorrect, even if there were no conflict of decisions (as there is) between the United States Circuit Court of Appeals in different circuits. The issue herein is as to the construction and application of a New York State statute (Chap. 690, Laws of 1899), and the Court of Appeals of this State having defined and determined the extent to which the acts complained of are in contravention of the statute,

513

514 its decision is final and conclusive. It follows, therefore, that in consonance with the decision of Chief Justice Parker, writing for the majority of the court, plaintiffs are entitled to judgment with costs against defendants, restraining them from interfering in any way with the sale of uncopyrighted books to plaintiffs, and for the damages which plaintiffs have sustained by reason of defendants' unlawful acts in the premises. Let findings and judgment be settled on notice, including the findings proposed on behalf of defendants, American Publishers' Association and others, which will be passed on at the same time.

515 DOWLING, J.

Order of Affirmance.

517

At a Term of the Appellate Division
of the Supreme Court held in and
for the First Judicial Department
in the County of New York, on the
8th day of July, 1908.

Present—HON. GEORGE L. INGRAHAM,

“ CHESTER B. McLAUGHLIN,

“ JOHN PROCTOR CLARKE,

“ JAMES W. HOUGHTON,

“ FRANCIS M. SCOTT, Justices.

518

ISIDOR STRAUS and NATHAN
STRAUS, composing the firm
of R. H. Macy & Co.,

Appellants.

vs.

AMERICAN PUBLISHERS ASSOCIA-
TION *et al.*,

Respondents.

Order of Affirmance on appeal from Judgment entered on Decision of the Court or on Report of Referee.

519

An appeal having been taken to this Court by the plaintiffs from part of an interlocutory judgment of the Supreme Court entered on the 20th day of November, 1907, and the said appeal having been argued by Mr. Edmond E. Wise, of counsel for the appellant, and by Mr. Stephen H. Olin of counsel for the respondent, and due deliberation having been had thereon, it is ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things,

520 affirmed, and that the respondent recover of the appellant the costs of this appeal.

Enter

G. L. I.

Judgment of Affirmance.

SUPREME COURT.

NEW YORK COUNTY.

521

ISIDOR STRAUS and NATHAN
STRAUS, composing the firm
of R. H. Macy & Co.,
Plaintiffs-Appellants,

against

AMERICAN PUBLISHERS ASSOCIA-
TION, and others,
Defendants-Respondents.

522

The appeal taken herein by the above named plaintiffs from so much of the interlocutory judgment entered in this action on the 20th day of November, 1907, after a trial before Mr. Justice Dowling without a jury, as failed or refused to grant to the plaintiffs an injunction restraining any interference with their purchase or sale of copyrighted books and failed and refused to award, or to direct the Referee appointed in said interlocutory judgment to ascertain the damages suffered by the plaintiffs in the purchase or sale

of copyrighted books since May 1st, 1901, and from so much of said judgment as failed or refused to hold that the combinations, agreements or resolutions of the two defendant associations and their respective members were wholly contrary to the statute law of the State of New York, more particularly of the Laws of 1899, Chapter 690, and the statute laws of the United States, more particularly of the statute passed on July 2, 1890, known as "an Act to protect trade and commerce against unlawful restraints and monopolies," in so far as concerned copyrighted books and from each and every part of the said interlocutory judgment which failed to award the aforementioned damages or made provision for ascertaining the same and failed to make provision for restraining interference by the defendants with the purchase and sale by the plaintiffs of copyrighted books under or pursuant to the contracts or agreements or resolutions set forth in the complaint, having been brought to a hearing and heard at a Term of the Appellate Division of the Supreme Court, First Department, held in the County of New York, on the 9th day of June, 1908, and an order of the said Appellate Division, dated 8 July, 1908, having been made and entered affirming the said interlocutory judgment, 523 524 525

Now, on motion of Stephen H. Olin, attorney for defendants American Publishers Association and publishers defendants,

ORDERED, ADJUDGED AND DECREED that the said interlocutory judgment entered in this action on the 20th day of November, 1907, be and the same is hereby in all things affirmed with the sum of eighty-four dollars and eighty-seven cents

526 (\$84.87), costs of said appeal, as taxed by the Clerk of this Court, to be paid by the appellants, Isidor Straus and Nathan Straus composing the firm of R. H. Macy & Company, to respondents American Publishers Association and others appearing by Stephen H. Olin, as attorney.

Judgment, October 20th, 1908.

PETER J. DOOLING.

Clerk.

527

528

Opinions Delivered by Appellate Division. 529

SUPREME COURT.

APPELLATE DIVISION—FIRST DEPARTMENT.

June, 1908.

GEORGE L. INGRAHAM,
CHESTER B. McLAUGHLIN,
JOHN PROCTOR CLARKE,
JAMES W. HOUGHTON,
FRANCIS M. SCOTT, JJ.

530

ISIDOR STRAUS and another,
Appellants,

against

AMERICAN PUBLISHERS' ASSO-
CIATION and others,
Respondents.

No. 2266.

Appeal from interlocutory judgment entered
upon decision of the Court at Special Term. 531

EDMOND E. WISE, for Appellants.
STEPHEN H. OLIN, for Respondents.

Per Curiam: Judgment affirmed, with costs on
the authority of 177 N. Y., 473.

INGRAHAM, J. (Dissenting).

When this action was before this court on an
appeal from a judgment sustaining a demurrer to

- 532 the complaint we held that the contracts between the defendants were in violation of Section 1 of chapter 690 of the laws of 1899, and were, under the provisions of that act, "against public policy, illegal and void." In discussing the agreement, we stated that all books published, whether copyrighted, or not copyrighted, were, articles or commodities of common use, within the provisions of this statute. Upon an appeal to the Court of Appeals (177 N. Y., 473), that judgment was affirmed. In discussing the question presented, however, the court expressed the opinion that the effect of the copyright Statute of the United
- 533 States was to give to the owner of the copyright such a monopoly in the sale of copyrighted books that he could make any agreement restricting the sale of the books by others to whom the owner of the copyright had sold them without being subjected to the regulations of the various states in relation thereto, Chief Judge Parker saying: "A combination creating a monopoly of the sale of books *not* protected by copyright offends against the law of this state as much as if it related to bluestone (164 N. Y., 401), or to envelopes (166 N. Y., 292), and according to this complaint, which must be accepted as true on this review,
- 534 such an outcome is not only possible but probable. But it is not of moment whether such a result is probable or not, for the test to be applied is, what *may* be done under the agreement?" In relation to copyright books, however, the court applied what it understood to be the rule of the Supreme Court of the United States as applied to patented articles, saying: "The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by

the licensee for the right to manufacture or use 535
 or sell the article, will be upheld by the courts.
 The fact that the conditions in the contracts keep
 up the monopoly or fix prices does not render
 them illegal. That reasoning is employed, as
 to patent rights. It is equally applicable, to
 copyrights the protection of which was perhaps
 the leading object of the association and agree-
 ment attacked in this action." In an action
 brought in the Circuit Court of the United States
 by the Bobbs-Merrill Company, who was a party
 to these agreements to enforce the right of the
 owner of a copyrighted book to impose a condi-
 tion as to the price at which the book should be 536
 resold by the purchaser, the court, as I read its
 opinion, held that under the Copyright Statutes
 of the United States when once the owner of the
 copyright had "vended" the books the owner of
 the copyright had no further control over them.
 In that case the Court said: "It is the contention
 of the appellant that the Circuit Court erred in
 failing to give effect to the provision of section
 4,952, protecting the owners of the copyright in
 the sole right of vending the copyrighted book
 or other article, and the argument is that the stat-
 ute vested the whole field of the right of exclusive
 sale in the copyright owner; that he can part with 537
 it to another to the extent that he sees fit, and may
 withhold to himself by proper reservations, so
 much of the right as he pleases.

It is not denied that one who has sold a copy-
 righted article, without restriction, has parted
 with all right to control the sale of it. The pur-
 chaser of a book, once sold by authority of the
 owner of the copyright, may sell it again, al-
 though he could not publish a new edition of it.

The precise question, therefore, in this case is,
 does the sole right to vend (named in Section

- 532 the complaint we held that the contracts between the defendants were in violation of Section 1 of chapter 690 of the laws of 1899, and were, under the provisions of that act, "against public policy, illegal and void." In discussing the agreement, we stated that all books published, whether copyrighted, or not copyrighted, were, articles or commodities of common use, within the provisions of this statute. Upon an appeal to the Court of Appeals (177 N. Y., 473), that judgment was affirmed. In discussing the question presented, however, the court expressed the opinion that the effect of the copyright Statute of the United
- 533 States was to give to the owner of the copyright such a monopoly in the sale of copyrighted books that he could make any agreement restricting the sale of the books by others to whom the owner of the copyright had sold them without being subjected to the regulations of the various states in relation thereto, Chief Judge Parker saying: "A combination creating a monopoly of the sale of books *not* protected by copyright offends against the law of this state as much as if it related to bluestone (164 N. Y., 401), or to envelopes (166 N. Y., 292), and according to this complaint, which must be accepted as true on this review,
- 534 such an outcome is not only possible but probable. But it is not of moment whether such a result is probable or not, for the test to be applied is, what *may* be done under the agreement?" In relation to copyright books, however, the court applied what it understood to be the rule of the Supreme Court of the United States as applied to patented articles, saying: "The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by

the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal. That reasoning is employed, as to patent rights. It is equally applicable, to copyrights the protection of which was perhaps the leading object of the association and agreement attacked in this action." In an action brought in the Circuit Court of the United States by the Bobbs-Merrill Company, who was a party to these agreements to enforce the right of the owner of a copyrighted book to impose a condition as to the price at which the book should be resold by the purchaser, the court, as I read its opinion, held that under the Copyright Statutes of the United States when once the owner of the copyright had "vended" the books the owner of the copyright had no further control over them. In that case the Court said: "It is the contention of the appellant that the Circuit Court erred in failing to give effect to the provision of section 4952, protecting the owners of the copyright in the sole right of vending the copyrighted book or other article, and the argument is that the statute vested the whole field of the right of exclusive sale in the copyright owner; that he can part with it to another to the extent that he sees fit, and may withhold to himself by proper reservations, so much of the right as he pleases.

It is not denied that one who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.

The precise question, therefore, in this case is, does the sole right to vend (named in Section

538 4,952), secure to the owner of the copyright the right, after a sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction.

539 In our view, the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract."

540 It thus having been determined that the copyright statutes do not give to the owner of the copyright the right to regulate the future sale of the book covered by the copyright after he has sold it to a third person by a notice reserving to itself the right to regulate its sale, it would seem that the copyright statutes do not authorize the owner of the copyrighted books to enter into an agreement whereby the future sale of the book would be restricted which is in violation of the statutory law of a state regulating contracts or agreements which may be entered into by its citizens in relation to the sale or disposition of property of such a character; and as the basis upon which the Court of Appeals discriminated between books protected by copyright and books not so protected was the protection or right given to the owners of a copyright by the copyright statutes of the United States, and as the Supreme Court of the United States has held that no such

right existed, it seems to me that the distinction which it was thought existed between copyright books and those not protected by a copyright does not exist, and that when the decision of a question by the Court of Appeals depends upon the construction of a federal statute and the Supreme Court of the United States has decided that question differently from that assumed by the Court of Appeals, that Court has distinctly recognized that its decisions have "ceased to be authorities." *Sanders vs. State of New York*, 182 N. Y., 400. Applying the decision of the Court of Appeals and of the Supreme Court of the United States I think that the agreements relating to copyrighted books were "against public policy, illegal and void" as well as such agreements when relating to books not protected by a copyright.

541

542

McLAUGHLIN, J.—(Concurring.)

When this case was before the Court on a former appeal from an interlocutory judgment sustaining a demurrer to the complaint (85 App. Div., p. 460) I was of the opinion that the agreement in question, in so far as it related to copyright books, did not violate Sec. 1 of Chapter 690 of the Laws of 1899, and it seems from the opinion delivered by Chief Judge Parker that the Court of Appeals entertained the same view,—177 N. Y., 473. The recent decision of the Supreme Court of the United States in *The Bobbs-Merrill Co. v. Straus et al.*, is to the effect, as I read the opinion of Mr. Justice Day, that this view is erroneous and for this reason I concur in the opinion of Mr. Justice Ingraham.

543

544 **Order Granting Leave to Appeal to
Court of Appeals.**

At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department, in the County of New York, on the 16th day of October, 1908.

Present—Hon. EDWARD PATTERSON, Presiding Justice,

“ GEORGE L. INGRAHAM,

“ FRANK C. LAUGHLIN,

545 “ JOHN PROCTOR CLARKE,

“ FRANCIS M. SCOTT, Justices.

ISIDOR STRAUS & ANO.,
Appellants,

against

AMERICAN PUBLISHERS ASSOCIATION,
Respondents.

**Order Grant-
ing Leave
to Appeal
to the Court
of Appeals.**

546

The above named plaintiffs having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 8th day of July, 1908,

Now, upon reading and filing the notice of motion, with proof of due service thereof and the affidavit of Edmond E. Wise, in support of said motion, and the affidavit of Stephen H. Olin, in opposition thereto; and after hearing Mr. E. E. Wise, for appellants and Mr. S. H. Olin, for respondents, it is

Hereby ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, to wit: 547

"Are the plaintiffs, under the findings of fact contained in the decision in this case, entitled, in so far as copyrighted books are concerned, to the relief demanded in the complaint, or to any relief as against the defendants in this case?"

Enter,

E. P.,

J. S. C. 548

Opinions Delivered in the Court of Appeals.

ISIDOR STRAUS, *et al.*,
Appellants,

vs.

AMERICAN PUBLISHERS' ASSOCIATION, *et al.*,
Respondents.

549

(Decided December 8th, 1908.)

Appeal by the plaintiffs, pursuant to permission, from a judgment of the Appellate Division of the Supreme Court in the First Department, entered on the 10th day of July, 1908, which affirmed, by a divided court, an interlocutory judg-

550 ment rendered at a Special Term of the Supreme Court in New York County.

The Appellate Division certified the following question to this Court: "Are the plaintiffs, under the finding of fact contained in the decision in this case, entitled, in so far as copyrighted books are concerned, to the relief demanded in the complaint, or to any relief as against the defendants in this case?"

EDMOND E. WISE, for Appellants.

STEPHEN H. OLIN, for Respondents.

551 GRAY, J.: I think this judgment should be affirmed and that we should adhere to our previous decision in this case. We should not, upon the present appeal, entertain the question of the correctness of the propositions decided; but we should take them as declarations of the law, pronounced by the Court after due deliberation, and conclusive in the action. The question of the extent, to which the rights conferred by the copyright statutes may be protected to contract, is still an open one in the United States Supreme Court. The case of *Bobbs-Merrill Co. v. Straus* (210 U. S., 339) differs in the important fact that there
552 was no such contract, as was in question here. The claim for protection, there, rested upon a printed notice in the book fixing its price at retail.

The object of copyright and of patent statutes is to give monopolies and that contracts made by the owners of copyrights, to secure the fullest protection in the enjoyment of the monopoly, will not be condemned by the Courts, for being in unlawful restraint of trade, we have decided. Until the United States Supreme Court has pronounced differently upon such an agreement concerning the future sales of copyrighted books, as is now in

question our former decision stands as the law of the case; however it may be argued that in some other action the decision of the Federal tribunal warrants a different inference as to the interpretation to be given to the copyright statute. 553

WILLARD BARTLETT, J. (dissenting): The grievance of the plaintiffs upon this appeal is that they have not been awarded all the relief to which they claim to be entitled. The interlocutory judgment proceeds upon the theory that the agreements of the American Publishers' Association and the American Booksellers' Association, which have given rise to the controversy in this action, are unlawful so far as they relate to uncopyrighted books; but are lawful so far as they relate to copyrighted books. Such was the view of this Court upon the previous appeal, when an order of the Appellate Division overruling a demurrer to the complaint was sustained (*Straus v. American Publishers' Assn.*, 177 N. Y., 473). 554

Upon that appeal the Court, speaking through Parker, Ch. J., held in substance that the agreements in question would have been free from legal objection if they had been intended to operate solely upon transactions in copyrighted publications. They were condemned only because they affected "the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all, if he fails to comply with the rules of the association." The two members of the Court who then dissented upheld the validity of the agreements on the ground that they did not in their opinion really extend to uncopyrighted books. (See dissenting opinion of Gray, J., 177 N. Y., 555)

556 on p. 490.) It is apparent, therefore, that all the judges who participated in the decision of the first appeal in this case agreed as to one point, that is, that there was something in the Federal copyright statutes which permitted a restraint of trade in copyrighted books that the law would not tolerate as applied to books not copyrighted.

This being the law of the case as laid down upon the first appeal we are bound upon well-recognized principles to adhere to it upon any subsequent review of the controversy in any aspect, unless the doctrine of our previous decision has been adjudged, to be erroneous by a tribunal of superior authority. In the great mass of litigations which are brought here for review this is the Court of last resort. Our construction and interpretation of the law, however, is not final and conclusive in regard to the meaning, scope and effect of the laws of the United States. "The doctrine of *stare decisis* is based upon the assumption that the rules of law to which this doctrine applies have previously been determined by a Court having final jurisdiction of the question involved. For this reason, where the decision of a tribunal is subject to review by one having superior authority over it, for that purpose, or the question determined may be passed upon by such tribunal in another case, the doctrine of *stare decisis* does not apply with full force until the same questions have been determined by the Court of last resort. The construction of an act of Congress cannot be said to be authoritatively settled until passed upon by the highest court authorized to do so. This is the Supreme Court of the United States" (Calhoun G. M. Co. vs. Ajax G. M. Co., 27 Col. 11).

557

558

The view which this Court adopted upon the first appeal in this case as to the effect of the

copyright laws of the United States upon the subject matter of the agreements which are attacked as being in restraint of trade has, it seems to me, been quite distinctly rejected in a subsequent decision by the Supreme Court of the United States in a litigation to which the plaintiffs here were parties. (Bobbs-Merrill Co. v. Straus, 210 U. S., 339.) On the previous appeal in this Court Chief Judge Parker, after quoting the language used by the United States Supreme Court in *Bement vs. National Harrow Co.* (186 U. S., 70), to the effect that the courts would uphold any conditions not in their very nature illegal in regard to patent, imposed by the patentee and agreed to by the licensee, for the right to manufacture or use or sell the articles, went on to say that such reasoning although employed in the case cited in respect to patent rights was "equally applicable to copyrights." On the other hand, Mr. Justice Day, writing for the Supreme Court of the United States in the Bobbs-Merrill case, expressly declares that "there are differences between the patent and copyright statutes in the extent of the protection granted by them," and cites with approval an opinion by Circuit Court Judge Lurton in which he said that these differences are so wide "that the cases which relate to the one subject are not controlling as to the other." (210 U. S., on p. 246.) In the Bobbs-Merrill case the owner of a copyrighted book inserted below the copyright notice in each copy the following statement: "The price of this book at retail is \$1.00 net. No dealer is licensed to sell it at a less price and a sale at a less price will be treated as an infringement of the copyright." The question presented for decision was whether the sole right to vend given to the owner of the copyright by the Federal law was such as to "secure to the owner of the copyright the right after a sale of the book

559

560

561

- 562 to a purchaser to restrict the future sale of the book at retail to the right to sell it at a certain price per copy because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to the one undertaking to sell for less than the named sum?" The court answered this question in the negative, holding in substance that while the copyright laws secure to the owner of a copy-right the right of multiplication and the right to vend copies, he may not qualify the title of a future purchaser by means of such a notice as has been quoted. The fair import of the decision is
- 563 that the owner of a copyright obtains nothing as such under the Federal law but the exclusive right to publish and multiply copies of the protected work and vend the same. Where he sells copies, the contracts of sale are unaffected by the copyright statutes but are subject to the same rules of law as those which apply to contracts for the sale of other personal property.

If I understand the decision in the *Bobbs-Merrill* case correctly, the fact that the agreements in question here related to copyrighted books could not operate to make those agreements valid if they were otherwise in violation of the statutes forbidding contracts in restraint of trade. In

564 other words, a copyright does not carry to the owner thereof any more right to enter into a contract in restraint of trade in the copyrighted book than he has to enter into a contract which will restrain trade in a book which is not copyrighted.

As was said by the present chief judge of this court when a member of the Appellate Division in the second department, referring to the publication of a copyrighted book: "We suppose that the author of a new geometry may fix the price at which he will sell his work at any sum, or arrange with others for its publication and sale at the stip-

ulated price. But if all the publishers of books on geometry were to combine and agree not to sell any publication on that subject except for a stipulated price, the contract would be in restraint of trade and void." (*Murphy vs. Christian Press Assn. Pub. Co.*, 38 App. Div., 430.) 565

Although it is true that the question decided by the Supreme Court of the United States in *Bobbs-Merrill Co. v. Straus* (*supra*), was not the precise question presented in the case at bar, nevertheless, it seems to me that what was said in the opinion therein as to the scope and effect of the copyright statutes is inconsistent, and indeed irreconcilable with the view originally taken by this court as to the effect of a copyright upon books which are the subject-matter of a contract in restraint of trade. The effect of a copyright is a Federal question. A decision by the Supreme Court of the United States upon such a question is binding upon the Court of Appeals. So far, then, as the previous decision of this Court was in conflict with the construction of the copyright laws adopted by the Supreme Court of the United States it must be deemed to have been overruled. 566

Subject to the modification rendered necessary by the decision in the *Bobbs-Merrill* case I think we are bound to construe the agreements in controversy as we construed them upon the previous appeal. We then held that the contracts were bad so far as they related to uncopyrighted books. That view remains unassailed. We held, on the other hand, that they were good so far as they related to copyrighted books. That view must now be deemed erroneous and must be abandoned. Those parts of the agreements which deal with copyrighted books must now be regarded as equally objectionable and subject to the condemnation of the statutes forbidding contracts in restraint of trade. In so holding, we shall be ap- 567

- 568 plying the doctrine of *stare decisis* as far as we can, and at the same time shall pay due regard to an adjudication which I think we ought to treat as a controlling authority.

I advise a reversal of the interlocutory judgment so far as it denies relief to the plaintiff in reference to transactions in copyrighted books under the agreements in controversy and that the question certified be answered in the affirmative.

HAIGHT, VANN and HISCOCK, JJ., concur with GRAY, J. CULLEN, Ch. J., and CHASE, J., concur with WILLARD BARTLETT, J.

- 569 Order affirmed, etc.

Judgment on Remittitur.

SUPREME COURT.

COUNTY OF NEW YORK.

570 ISIDOR STRAUS and NATHAN STRAUS, composing the firm of R. H. MACY & COMPANY,
Plaintiffs,

against

AMERICAN PUBLISHERS' ASSOCIATION and others,
Defendants.

Judgment
on
Remittitur.

An interlocutory judgment in this action in favor of the plaintiffs against the defendants hav-

ing been rendered in this court on the 20th day of November, 1907; and the plaintiffs having appealed from said judgment to the Appellate Division of this Court for the First Department from so much and such part of said interlocutory judgment as failed or refused to grant relief to plaintiff in so far as copyrighted books were concerned, and the said judgment having been affirmed in all things by this Court at said Appellate Division by order of affirmance dated the 8th day of July, 1908, entered and filed herein on the 10th day of July, 1908, and judgment of affirmance having been rendered thereon the 20th day of October, 1908, and the plaintiffs having appealed from said order and judgment to the Court of Appeals; and the said Court of Appeals having sent hither its remittitur, filed herein the 11th day of December, 1908, by which it appears that the said Court of Appeals has affirmed the said order and judgment in all things with costs and had given judgment accordingly, and has remitted the judgment of said Court of Appeals to this court to be enforced according to law; and this court having by an order duly entered herein the 11th day of December, 1908, ordered that said judgment be made the judgment of this court and the costs of the defendant American Publishers' Association having been duly taxed at the sum of one hundred and fifty-one 17/100 (\$151.17) dollars

Now on motion of Stephen H. Olin, Esq., attorney for the American Publishers' Association and other publishers, defendants, it is hereby

ORDERED, ADJUDGED AND DECREED that said order in this action entered in the office of the clerk of the County of New York on the 10th day of July, 1908, and said judgment of affirmance entered in said office on the 20th day of October, 1908, be

- 574 and the same are hereby wholly affirmed, with one hundred and fifty-one 17/100 (\$151.17) dollars costs to be paid by the plaintiffs Isidor Straus and Nathan Straus to the defendant American Publishers' Association, and the question certified to said Court of Appeals is answered in the negative.

Judgment 14 December, 1908.

PETER J. DOOLING,
Clerk.

575

Referee's Report.

NEW YORK SUPREME COURT.

NEW YORK COUNTY.

ISIDOR STRAUS and NATHAN
STRAUS, composing the firm of
R. H. Macy & Company,
Plaintiffs,

576

against

AMERICAN PUBLISHERS ASSO., *et*
al.,
Defendants.

To the Supreme Court of New York:

I, EDWARD D. O'BRIEN, the Referee appointed in the above entitled action by interlocutory judgment entered herein on the 20th day of November, 1907, to take proof of the damages sustained

by the plaintiffs in any manner whatsoever by reason of the defendants' unlawful acts in the premises and to report the same with my conclusions thereon to this Court, hereby respectfully report: 577

1. That pursuant to the said interlocutory judgment, I duly took the statutory oath on the 8th day of February, 1909, which is hereto annexed and marked "Exhibit A."

2. That the parties hereto appeared before me on that day, the plaintiffs being represented by Edmond E. Wise, Esq.; the American Publishers' Association and other defendants who are Publishers by Stephen H. Olin, Esq.; the American Booksellers' Association and other defendants who are Booksellers by Thaddens D. Kenneson, Esq. 578

3. That thereafter and on succeeding days various witnesses on behalf of the plaintiffs and defendants were duly sworn and their evidence taken on the question of damages, sustained by the plaintiffs in accordance with the decision and interlocutory judgment herein, such evidence is herewith submitted as Exhibit B.

4. That after the taking of testimony was closed and after duly considering and deliberating upon the same and the various exhibits introduced into evidence the decision and interlocutory judgment of this Court, it is my opinion and I hereby report that the plaintiffs have sustained damages by the unlawful acts of the defendants in so far as uncopyrighted books are concerned. 579

5. I further report that the amount of damages that plaintiffs have so suffered is the sum of two thousand and seventy-two dollars and eighty-eight cents (\$2,072.88) and that in accordance with the terms of the interlocutory judgment, they are entitled to recover said sum from the defendants.

580 6. I further report that it is my conclusion that that plaintiffs, Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, are entitled to recover a judgment against the defendants and each of them, for the said sum of two thousand and seventy-two dollars and eighty-eight cents (\$2,072.88) as damages sustained by them by reason of the unlawful acts of the defendants in the premises, in so far as uncopyrighted books are concerned.

Dated, May 4th, 1909.

Respectfully submitted,

581

EDWARD D. O'BRIEN,
Referee.

582

Order Confirming Referee's Report. 583

At a Special Term of the Supreme Court, Part III thereof, held in the County Court House, in the County of New York, on the 20th day of May, 1909.

Present—Hon. VICTOR J. DOWLING, Justice.

ISIDOR STRAUS & ANO., Plaintiffs,	}	584
<i>against</i>		
AMERICAN PUBLISHERS ASSO. <i>et</i> <i>al.</i> , Defendants.		

This case having come on before me at a Special Term of this Court, held at Part III on the 13th day of May, 1907, and a decision having been filed by me on the 19th day of November, 1907, and an interlocutory judgment having been entered upon said decision on the 20th day of November, 1907, which, amongst other things, ordered that the plaintiffs were entitled to recover damages from the defendants and each of them which they have sustained in any manner whatsoever by reason of the defendants' unlawful acts in the premises and appointed Edward D. O'Brien, Esq., Referee, for the purpose of ascertaining such damages and to take proof of such damages and report the same with his conclusion to this Court.

- 586 And the Referee, Edward D. O'Brien, having taken proof of such damages and reported the same with his conclusion and such report having been filed on the 4th day of May, 1909, and such report of the Referee being that plaintiffs had suffered damages in the amount of \$2,072.88, by reason of the unlawful acts of the defendants in so far as uncopyrighted books were concerned, and due notice of the filing of such report having been given to the defendants and exceptions to said report having been filed by Stephen H. Olin, Esq., attorney for the defendants, the American Publishers Association and other defendants who
- 587 are publishers, on the 6th day of May, 1909, and a motion having been made on the 7th day of May, 1909, to overrule the exceptions to said report and to confirm said report and for final judgment, and said motion coming on to be heard before me on the 7th day of May, 1909, and after due proof having been made of the service of the said Notice of Motion and after reading the report of said Referee, and on all the papers and proceedings had herein, and after hearing Edmond E. Wise, Esq., of counsel, in support of said motion, and Stephen H. Olin, Esq., of counsel
- 588 for the American Publishers Association and other defendants who are publishers, in opposition thereto, and after due deliberation, it is

ORDERED that the report of the referee, Edward D. O'Brien, filed herein on the 4th day of May, 1909, which ascertains the damages suffered by the plaintiffs in their dealings in uncopyrighted books to be \$2,072.88, be and the same hereby is in all respects confirmed.

FURTHER ORDERED that the exceptions to said report filed herein on the 6th day of May, 1909,

be and the same hereby are in all respects over- 589
ruled,

FURTHER ORDERED that final judgment be entered herein and that such final judgment contain a provision for the recovery by the plaintiffs from the defendants of the sum of \$2,072.88 with costs, Referee's fees and disbursements to be taxed by the Clerk of the Court and an extra allowance of 5% on the amount of such damages.

Enter,

VICTOR J. DOWLING,

J. S. C. 590

Judgment.**NEW YORK SUPREME COURT.**

NEW YORK COUNTY.

ISIDOR STRAUS and NATHAN STRAUS, com-
posing the firm of R. H. Macy & Com-
pany,

Plaintiffs,

against

593

AMERICAN PUBLISHERS' ASSOCIATION.

George S. Emory, D. Appleton & Com-
pany; American News Company; Henry
B. Barnes, doing business as A. S.
Barnes & Company; Bretano's, Century
Company, Henry T. Coates and Edward
J. Scott, co-partners doing business un-
der the firm name of H. T. Coates &
Company; Thomas Y. Crowell; E. Os-
borne Crowell, T. Irving Crowell and J.
Osborne Crowell, co-partners, doing
business under the firm name of Thomas
Y. Crowell & Company; G. W. Dilling-
ham Company; Frank H. Dodd, Bleeck-
er Van Wegenen and Robert H. Dodd,
copartners, doing business under the

594

firm name of Dodd Mead & Company;
Doubleday, Page & Company; E. P. Dut-
ton & Company; Funk & Wagnalls
Company, Harper & Brothers, Henry
Holt and Charles Holt, co-partners, do-
ing business under the firm name of
Henry Holt & Company; George H.
Mifflin, James M. Kay, Henry A.
Houghton, Oscar R. Houghton, Al-
bert F. Houghton, Lucy H. Val-
der co-partners doing business un-
der the firm name of Houghton, Mifflin
& Company; McClure, Phillips & Com-
pany, Macmillan Company, New Am-
sterdam Book Company, James Pott and

James Pott, Jr., co-partners, doing business under the firm name of James Pott & Company; G. P. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, co-partners, doing business under the firm name of J. F. Taylor & Company; Adolph Wessels, doing business as A. Wessels & Company, Clarence E. Walcott, individually, and as President of the American Booksellers' Association, a voluntary unincorporated Association, Joseph W. Nichols, individually and as Secretary of the American Booksellers' Association; J. Wilson Hart, individually and as Treasurer of the American Booksellers' Association, Baker & Taylor Company, Fleming H. Revell Company and William R. Jenkins,

Defendants.

595

596

This action having come on for trial before me, one of the Justices of the Supreme Court, at a Special Term of said Court, held at Part III thereof, on the 13th and 14th, 16th, 17th, 20th, 21st and 23rd days of May, 1907, and the plaintiffs by their counsel, John G. Carlisle, Esq., and Edmond E. Wise, Esq., having duly presented their proofs, and the defendants, the American Publishers' Association and such defendants as are designated as publishers in Paragraph III of the Complaint, having submitted their proofs by Stephen H. Olin, Esq., their counsel, and the defendant, the American Booksellers' Association, and the defendants designated as booksellers in Paragraph V of the complaint, having appeared and submit-

597

598 ted their proofs by Thaddeus D. Kenneson, Esq.,
 their counsel and a decision having been filed by
 me that it appeared to my satisfaction that the
 material allegations of the complaint had been
 established by the proof and that the contract, ar-
 rangement or combination set forth in the com-
 plaint is unlawful so far as it related to uncopy-
 righted books, and in contravention of the Stat-
 ute in such cases made and provided, and an in-
 terlocutory judgment having been entered upon
 said decision on the 20th day of November,
 1907, which, amongst other things, provided for
 the appointment of a Referee for the purpose of
 599 ascertaining the damages suffered by the plain-
 tiffs by reason of the defendants' unlawful acts
 in so far as uncopyrighted books were concerned,
 and said Referee, Edward D. O'Brien, having
 duly filed his report to the effect that the dam-
 ages so suffered by the plaintiffs amounted to
 \$2,072.88 and the exceptions to said report hav-
 ing been overruled and the said report having
 been confirmed by an order entered the 20th day
 of May, 1909.

600 Now, THEREFORE, IT IS ORDERED, ADJUDGED AND
 DECREED that the defendants and each of them,
 their officers, agents, attorneys or servants be and
 they are hereby enjoined and restrained from in-
 terfering in any manner whatsoever with the pur-
 chase by the plaintiffs of uncopyrighted books at
 wholesale or retail; that the defendants and each
 of them, their officers, agents, attorneys and serv-
 ants be and they hereby are enjoined and re-
 strained from circulating or publishing any black-
 lists or cut off lists whose object is to interfere
 with the purchase by the plaintiffs of uncopy-
 righted books or to threaten, coerce or intimidate
 any person, firm or individuals whatsoever who

deal or may desire to deal with the plaintiffs in the purchase of uncopyrighted books; 601

FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiffs are entitled to recover from the defendants and each of them the sum of \$2,072.88, damages for the wrongful interference by the defendants with the plaintiffs business in so far as uncopyrighted books are concerned; together with the amount of \$1,497.08 dollars costs, Referee's fees and disbursements, as taxed by the Clerk of this Court, and an extra allowance of one hundred and three dollars and sixty-four cents (\$103.64), making a total of \$3,673.60 dollars and that they have execution therefor. 602

Dated New York, May 20th, 1909.

Enter,

(Signed) VICTOR J. DOWLING,
J. S. C.

Stipulation Waiving Certification.

Pursuant to Section 3301 of the Code of Civil Procedure we hereby stipulate that the foregoing are true copies of the Notice of Appeal to the Court of Appeals and Judgment Roll in this action and of the orders made herein by the Appellate Division in the Supreme Court in the First Department; and of all the papers on which the order of affirmance of the said Appellate Division was made; and of the judgment entered thereon; and of all papers filed herein in the Clerk's office 603

604 of the County of New York, and we hereby waive
certification of the same.

Dated July, 1909.

EDMOND E. WISE,
Attorney for Appellants.

STEPHEN H. OLIN,
Attorney for Respondent
American Publishers' Assn., *et al.*

KENNESON, CRAIN, EMELY & RUBINO,
Attorneys for Respondent,
American Booksellers' Ass'n, *et al.*

605

606

EXHIBIT B.

Court of Appeals.

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals held at the Capitol in the City of Albany on the 27th day of September, in the year of our Lord, one thousand nine hundred and ten before the Justices of said Court.

Witness the Hon. Edgar M. Cullen, Chief Judge Presiding.

R. M. BARBER, *Clerk*.

Remittitur September 28th, 1910.

ISIDOR STRAUS & NATHAN STRAUS, Composing the Firm of R. H. Macy & Co., Appellants,
against

AMERICAN PUBLISHERS' ASSOCIATION & AMERICAN BOOKSELLERS' ASSOCIATION et al., Respondents.

Be it remembered that on the 23rd day of July, in the year of our Lord, one thousand nine hundred and nine, Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, appellants in this action, came here into the Court of Appeals by Edmund E. Wise, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the final judgment of the Supreme Court entered after the affirmance of the interlocutory judgment by the Appellate Division of the Supreme Court, in and for the first judicial department and by the Court of Appeals and the American Publishers' Association and others, the respondents in said action afterwards appeared in said Court of Appeals by Stephen H. Olin and Kennison, Crane, Emley & Rubino, their attorneys.

Which said Notice of Appeal and the return thereto filed as aforesaid are hereto annexed.

Whereupon the said Court of Appeals, this cause having been submitted by counsel for the respective parties and after due deliberation had thereon, did order and adjudge that the judgment appealed from in this action be in all things affirmed and it was further ordered and adjudged that the respondents recover against the appellants costs of appeal to this Court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid and stands in full force and effect and

Thereupon as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by them given in the premises by the said Court of Appeals by

remitted into the Supreme Court of the State of New York before the Justices thereof according to the form of the statute in such case made and provided to be enforced according to law and which record now remains in the said Supreme Court before the Justices thereto, etc.

R. M. BARBER,

*Clerk of the Court of Appeals
of the State of New York.*

COURT OF APPEALS CLERK'S OFFICE.

ALBANY, September 28th, 1910.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals with the papers originally filed therein attached thereto.

[SEAL.]

R. M. BARBER, *Clerk.*

EXHIBIT C.

SUPREME COURT,
New York County.

ISIDOR STRAUS and NATHAN STRAUS, Co-partners, Composing the
Firm of R. H. Macy & Company, Plaintiffs,
against

AMERICAN PUBLISHERS' ASSOCIATION and Others, Defendants.

Judgment of Remittitur.

A final judgment in this action having been rendered in this Court on the 20th day of May, 1909, and the plaintiffs having appealed to the Court of Appeals from so much and such part of said judgment as fails or refuses to grant to the plaintiffs an injunction restraining any interference with the purchase or sale of copyrighted books, and fails or refuses to award damages alleged to have been suffered by the plaintiffs in the purchase or sale of copyrighted books since May 1, 1904, and from so much of said judgment as fails or refuses to hold that the combinations, agreements or resolutions of the two defendant associations and their respective members were wholly contrary to the statute law of the State of New York, more particularly of the Laws of 1899, Chap. 690, and the Statute Laws of the United States, more particularly of the Statute passed on July 2, 1890, known as "An Act to protect trade and commerce against unlawful restraints or monopolies," in so far as it concerns copyrighted books, and from each and every part of the said judgment which fails to award the aforementioned damages and fails to make provisions for restraining interference by the defendants with the purchase or sale by the plaintiffs of copyrighted books under or pursuant to the contracts or agreements or resolutions set forth in the complaint; the said judgment having been rendered after the affirmance upon an appeal to the Appellate Di-

vision of the Supreme Court of an interlocutory judgment entered on the 20th day of November, 1907; and the said Court of Appeals having sent hither its remittitur, filed herein on the 5th day of October, 1910, by which it appears that the said Court of Appeals has affirmed the said judgment in all things with costs and has given judgment accordingly, and has remitted the judgment of the said Court of Appeals to this Court having by an order duly entered herein the 5th day of October, 1910, ordered that said judgment be made the judgment of this Court and the defendants' costs having been duly taxed at the sum of 95 87 100 Dollars.

Now on motion of Stephen H. Olin, Esq., attorney for the defendants, it is

Adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Dated, the 15th day of October, 1910.

WILLIAM F. SNYDER, *Clerk*.

Know all men by these presents that we, Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, as principals, and Fidelity & Deposit Company of Maryland, are held and firmly bound unto American Publishers' Association, George S. Emory, D. Appleton & Company, American News Company; Henry B. Barnes, doing business as A. S. Barnes & Company; Brentano, Century Company, Henry T. Coates and Edward J. Scott, co-partners, doing business under the firm name of H. T. Coates & Company; Thomas Y. Crowell, E. Osborne Crowell, T. Irving Crowell, and J. Osborne Crowell, co-partners, doing business under the firm name of Thomas Y. Crowell & Company; G. W. Dillingham Company; Frank H. Dodd, Bleecker Van Wagener and Robert H. Dodd, co-partners, doing business under the firm name of Dodd, Mead & Company, Doubleday, Page & Company, E. P. Dutton & Company, Funk & Wagnalls Company, Harper & Brothers, Henry Holt and Charles Holt, co-partners, doing business under the firm name of Henry Holt & Company, George H. Millin, James M. Kay, Henry A. Houghton, Oscar R. Houghton, Albert F. Houghton, Lucy M. Valentine, co-partners, doing business under the firm name Houghton, Millin & Company; McClure, Phillips & Company; MacMillan Company; New Amsterdam Book Company; James Pott & James Pott, Jr., co-partners, doing business under the firm name of James Pott & Company; G. B. Putnam's Sons; Robert H. Russell; Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company; Joseph F. Taylor, Rutger B. Jewett, co-partners, doing business under the firm name of J. F. Taylor & Company; Adolf Wessels, doing business as A. Wessels Company; Clarence E. Walcott, individually and as President of the American Booksellers' Association, a voluntary unincorporated association; Joseph W. Nichols, individually and as Secretary of the American Booksellers' Association; J. Wilson Hurt, individually and as Treasurer of the American Book-

sellers' Association; Baker & Taylor Company; Fleming H. Revell Company; Fowler & Wells Company; Adolph Mackel and John Ammon, copartners, doing business under the firm name of Leggett Brothers; William R. Jenkins, in the full just sum of five hundred (500) dollars to be paid to the said American Publishers Association and other obligees of this bond, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this seventh day of November in the year of our Lord, one thousand nine hundred and ten.

Whereas lately at a Supreme Court of the State of New York, in a suit depending in said Court, between Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, plaintiffs, and the American Publishers Association and other obligees of this bond, defendants, a judgment was rendered against the said American Publishers Association and other obligees of this bond and the said Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the afore-said suit, and a citation directed to the said American Publishers' Association and other obligees of this bond, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof.

Now, the condition of the above obligation is such, that if the said Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ISIDOR STRAUS AND NATHAN STRAUS,

Composing the Firm of R. H. Macy & Company,

By ARCHIBALD KING, *Attorney,*

FIDELITY & DEPOSIT COMPANY
OF MARYLAND,

By H. B. HODGE, *Attorney in Fact,*

Sealed and delivered in presence of
S. McCANN.

Approved by
HORACE H. LURTON,

*Associate Justice of the Supreme
Court of the United States.*

[Endorsed:] United States Supreme Court. Isidor Straus & Ans., copartners, etc., Plaintiff in Error, against American Publishers' Assn., et al., defendant in error. Copy. Bond. Edmond E. Wise, Attorney for plaintiffs in error (Corn Exchange Bank Bldg.), 19 William Street, New York.

Supreme Court of the United States.

ISIDOR STRAUS & NATHAN STRAUS, Composing the Firm of R. H. Macy & Company, Plaintiffs in Error,

against

AMERICAN PUBLISHERS' ASSOCIATION, GEORGE S. EMORY, D. Appleton & Company, American News Company, Henry B. Barnes, Doing Business as A. S. Barnes & Company; Brentano's, Century Company, Henry T. Coates and Edward J. Scott, Co-partners, Doing Business under the Firm Name of H. T. Coates & Company; Thomas Y. Crowell, E. Osborne Crowell, T. Irving Crowell, and J. Osborne Crowell, Co-partners, Doing Business under the Firm Name of Thomas Y. Crowell & Company; G. W. Dillingham Company; Frank H. Dodd, Bleecker Van Wagnen, and Robert H. Dodd, Co-partners, Doing Business under the Firm Name of Dodd, Mead & Company; Doubleday, Page & Company; E. P. Dutton & Company, Funk & Wagnalls Company, Harper & Brothers, Henry Holt and Charles Holt, Co-partners, Doing Business under the Firm Name of Henry Holt & Company; George H. Milfin, James M. Kay, Henry A. Houghton, Oscar R. Houghton, Albert F. Houghton, Lucy H. Valentine, Co-partners, Doing Business under the Firm Name of Houghton, Mifflin & Company; McClure, Phillips & Company, Macmillan Company, New Amsterdam Book Company, James Pott & James Pott, Jr., Co-partners, Doing Business under the Firm Name of James Pott & Company; G. B. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, Co-partners, Doing Business under the Firm Name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, Co-partners, Doing Business under the Firm Name of J. F. Taylor & Company; Adolf Wessels, Doing Business as A. Wessels Company; Clarence E. Walcott, Individually and as President of the American Booksellers' Assn., a Voluntary Unincorporated Association; Joseph W. Nichols, Individually and as Secretary of the American Booksellers' Association; J. Wilson Hart, Individually and as Treasurer of the American Booksellers' Association; Baker & Taylor Company, Fleming H. Revell Company, Fowler & Wells Company, Adolph Mackel and John Annon, Co-partners, Doing Business under the Firm Name of Leggat Brothers, William R. Jenkins, Defendants in Error.

Petition for Writ of Error.

Now come Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, by Edward E. Wise, their counsel and say:

That on the 5th day of October, 1910, the Court of Appeals of the State of New York, made and entered a final order and judgment herein in favor of American Publishers' Association, George S. Emory, D. Appleton & Company; American News Company;

Henry B. Barnes, doing business as A. S. Barnes & Company, Brentano's, Century Company, Henry T. Coates and Edward J. Scott, co-partners doing business under the firm name of H. T. Coates & Company; Thomas Y. Crowell, E. Osborne Crowell, T. Irving Crowell, and J. Osborne Crowell, co-partners, doing business under the firm name of Thomas Y. Crowell & Company; G. W. Dillingham Company, Frank H. Dodd, Bleecker Van Wagnen and Robert H. Dodd, co-partners, doing business under the firm name of Dodd, Mead & Company; Doubleday, Page & Company; E. P. Dutton & Company, Funk & Wagnalls Company; Harper & Brothers, Henry Holt and Charles Holt, co-partners, doing business under the firm name of Henry Holt & Company; George H. Millin, James M. Kay, Henry A. Houghton, Oscar R. Houghton, Albert F. Houghton, Lucy H. Valentine, co-partners, doing business under the firm name of Houghton, Millin & Company, McClure, Phillips & Company; Maximilian Company; New Amsterdam Book Company, James Pott and James Pott, Jr., co-partners, doing business under the firm name of James Pott & Company; G. P. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, co-partners doing business under the firm name of J. F. Taylor & Company; Adolf Wessels, doing business as A. Wessels Company, Clarence E. Waleott, individually and as President of the American Booksellers' Association, a voluntary unincorporated Association; Joseph W. Nichols, individually and as Secretary of the American Booksellers' Association; J. Wilson Hart, individually and as Treasurer of the American Booksellers' Association; Baker & Taylor Company; Fleming H. Revell Company; Fowler & Wells Company, Adolph Mackel and John Annon, co-partners, doing business under the firm name of Leggat Brothers, William R. Jenkins, the defendants in error above named, and against Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, the plaintiffs in error above named, and afterwards and on the 15th day of October, 1910, the records and proceedings in said cause having been remitted to the Supreme Court of the State of New York in and for the County of New York, said final order and judgment of the Court of Appeals were made and entered as the final order and judgment of said Supreme Court in which final order and judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the said plaintiffs in error, all of which will more in detail appear from the Assignment of Errors which is hereto annexed and is filed with this petition.

The said Court of Appeals of the State of New York is the highest — of the said State of New York in which a decision in this cause could be had.

A printed copy of the record in said Court of Appeals which contains the opinion of the Appellate Division of the Supreme Court of the State of New York for the First Department upon the appeal from the interlocutory judgment herein, upon a former appeal, and

also the opinions of the Court of Appeals of the State of New York, affirming said interlocutory judgment is herewith submitted and filed and marked Exhibit A.

A copy of the said final order and judgment or remittitur of the Court of Appeals is hereto annexed and marked Exhibit B, and a copy of the final order and judgment of the Supreme Court entered upon the said remittitur is hereto annexed and marked Exhibit C.

Wherefore your petitioners pray that a Writ of Error may issue in this behalf from the Supreme Court of the United States to the Supreme Court of the State of New York, for the correction of the errors and the reversal of the judgments so complained of; that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States; that the said Writ operate as a supersedeas; that the amount of the security which the petitioners shall give and furnish on said Writ of Error may be fixed and that upon the giving of such security all further proceedings in said Court be suspended and stayed until the determination of the said Writ of Error by the Supreme Court of the United States.

Dated, October 26th, 1910.

EDMOND E. WISE.

Counsel for Petitioners.

STATE OF NEW YORK.

County of New York, ss:

Isidor Straus, being duly affirmed, says: That he is one of the members of the firm of R. H. Macy & Company, and is one of the petitioners named in the foregoing petition. That the said petition is true to his own knowledge except as to the matters therein alleged to be stated on information and belief and that as to those matters he believes it to be true.

ISIDOR STRAUS.

Affirmed to before me this 26th day of October, 1910.

[Seal Clifford H. Owen, Notary Public, New York County.]

CLIFFORD H. OWEN.

Notary Public, No. 41, New York County.

Supreme Court of the United States.

ISIDOR STRAUS & NATHAN STRAUS, Composing the Firm of R. H. Macy & Company, Plaintiffs in Error,

against

AMERICAN PUBLISHERS' ASSOCIATION et al., Defendants in Error.

Assignment of Errors.

Now come Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, the above named plaintiffs in error, by

Edmond E. Wise, their counsel, and in connection with the petition for a Writ of Error filed herewith, say:

That in the record and proceedings in this cause and in the final order and judgment made and entered herein on October 15th, 1910, the Supreme Court of the State of New York, on a remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to wit:

I.

Said Court erred in holding that the agreements, resolutions or combinations set forth in the complaint which were entered into by the defendants were not unlawful, illegal and contrary to the Statutes of the United States and more particularly of the Statute passed on July 2, 1890, known as "An Act to protect trade and commerce against unlawful restraints and monopolies" in so far as concern copyrighted books.

II.

Error in deciding that the owners of several separate copyrights are empowered to enter by virtue of the copyright laws into contracts or agreements or combinations between themselves concerning the supply and price of books published under their separate copyrights which would be unlawful and contrary to the Statute of the United States passed on the 2nd day of July, 1890, known as "An Act to protect trade and commerce against unlawful restraints and monopolies" if such books were not copyrighted.

III.

Error in holding and deciding that the resolutions and agreements purporting to restrict the effect of the combinations, arrangements or contracts to copyrighted books set forth in the complaint were lawful and not contrary to the aforementioned statute of the United States known as "An Act to protect trade and commerce against unlawful restraints and monopolies."

IV.

Error in holding and deciding that the owner or proprietor of a copyright can, by virtue of the copyright statutes of the United States, after he has parted with the title to the copyrighted book, continue to control the sale or re-sale of such books by reason of the copyright law in violation of the aforementioned statute of the United States known as "An Act to protect trade and commerce against unlawful restraints and monopolies."

V.

Error in refusing to hold and decide that the plaintiffs in error were entitled to an injunction and to recover damages against the defendants because of the acts of the defendants in carrying out the arrangements, agreements or contracts set forth in the complaint

entered into for the purpose of maintaining and fixing the price of copyrighted throughout the United States of America and of depriving the plaintiffs in error of their power to purchase copyrighted or uncopyrighted books in the ordinary course of business contrary to the aforementioned statute of the United States passed July 2nd, 1890, known as "An Act to protect trade and commerce against unlawful restraints and monopolies."

Wherefore the said Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, plaintiffs in error, pray that the judgment entered in the office of the Clerk of New York County on October 15th, 1910, pursuant to the remittitur of the said Court of Appeals of the State of New York be reversed and that judgment be rendered herein in favor of the plaintiffs in error sustaining this appeal from that portion of the interlocutory and final judgment entered in this action which failed or refused to hold that the combinations, agreements or resolutions of the defendants were wholly contrary to the statute laws of the United States more particularly of the statute passed on July 2, 1890, known as "An Act to protect trade and commerce against unlawful restraints and monopolies," in so far as concerns copyrighted books and from each and every part of said interlocutory and final judgment which fails to award damages to the aforementioned plaintiffs in error with respect to such copyrighted books and which fails to make provision for restraining the interference by the defendants with the purchase or sale of copyrighted books under or pursuant to the contracts or agreements or resolutions set forth in the complaint.

EDMOND E. WISE,
Counsel for Plaintiffs in Error,
Plaintiffs in the Lower Court.

The Writ of Error as prayed for in the foregoing petition is hereby allowed and the bond is fixed at the sum of — dollars.

Dated — —, 1910.

— —.

UNITED STATES OF AMERICA, ss:

To American Publishers' Association, George S. Emory, D. Appleton & Company; American News Company; Henry B. Barnes, doing business as A. S. Barnes & Company; Brentano's, Century Company, Henry T. Coates and Edward J. Scott, co-partners doing business under the firm name of H. T. Coates & Company, Thomas Y. Crowell, E. Osborne Crowell, T. Irving Crowell, and J. Osborne Crowell, co-partners, doing business under the firm name of Thomas Y. Crowell & Company, G. W. Dillingham Company, Frank H. Dodd, Bleecker Van Wagnen and Robert H. Dodd, co-partners, doing business under the firm name of Dodd, Mead & Company, Doubleday, Page & Company, E. P. Dutton & Company, Funk & Wagnalls Company, Harper Brothers, Henry Holt and Charles Holt, co-partners, doing business under the firm name of Henry Holt & Company, George H. Mifflin, James M. Kay, Henry S. Houghton, Oscar R. Houghton, Albert F. Houghton, Lucy H. Valentine, co-partners, doing business under the firm name of Houghton, Mifflin & Company, McClure, Phillips & Company, Macmillan Company, New Amsterdam Book Company, James Pott and James Pott, Jr., co-partners, doing business under the firm name of James Pott & Company; G. P. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, co-partners, doing business under the firm name of J. F. Taylor & Company, Adolf Wessels, doing business as A. Wessels Company, Clarence E. Walcott, individually and as President of the American Booksellers' Association, a voluntary unincorporated Association; Joseph W. Nichols, individually and as Secretary of the American Book-sellers' Association; J. Wilson Hart, individually and as Treasurer of the American Booksellers' Association; Baker & Taylor Company, Fleming H. Revell Company, Fowler & Wells Company, Adolph Mackel and John Ammon, co-partners, doing business under the firm name of Leggat Brothers and William R. Jenkins, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York wherein Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Horace H. Lurton, Associate Justice of the Supreme Court of the United States, this 3d day of Nov., in the year of our Lord one thousand nine hundred and ten.

HORACE H. LURTON,

*Associate Justice of the Supreme Court
of the United States.*

[Endorsed:] United States Supreme Court. Isidor Straus & Ano., copartners doing business under the firm name of R. H. Macy & Company, Plaintiffs in error against American Publishers' Asso. et al., Defendants in error, Citation. Edmond E. Wise, Solicitor for plaintiffs in error, 15 William Street, Borough of Manhattan. Received Nov. 11, 1910. Wm. F. Schneider, Clerk of the Supreme Court.

On this 11th day of November, in the year of our Lord one thousand nine hundred and ten, personally appeared Harold H. Richmond before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Kennesson, Crain, Embry & Rubino, the attorneys for the defendants American Booksellers' Ass. and others, and on Stephen H. Olin, attorney for defendants American Publishers' Ass. and others.

HAROLD H. RICHMOND.

Sworn to and subscribed the 11th day of November, A. D. 1910.

WALTER P. FRAULY,

Notary Public, New York County, No. 78.

Certificate filed in Register's Office, No. 1001.

Copy of within Citation this 11th day of November 1910.

KENNESSON, CRAIN, EMBRY & RUBINO,

OLIN, CLARK & PHELPS,

Attorneys for American Publishers' Association.

UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of New York on a remittitur from the Court of Appeals of the State of New York, being the highest court of law or equity of the said State in which a decision can be had, before you, or some of you, between Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, plaintiffs-appellants, and American Publishers' Association, George S. Emory, D. Appleton & Company; American News Company; Henry B. Barnes, doing business as A. S. Barnes & Company; Brentano's, Century Company, Henry T. Coates and Edward J. Scott, co-partners, doing business under the firm name of H. T. Coates & Company, Thomas Y. Crowell, E. Osborne Crowell, T. Irving Crowell, and J. Osborne Crowell, co-partners, doing business under the firm name of Thomas Y. Crowell & Company, G. W. Dillingham Company, Frank H. Dodd, Bleecker Van Wagnen and Robert H. Dodd, co-partners, doing business under the firm name of Dodd, Mead & Company, Doubleday, Page & Company, E. P. Dutton & Company, Funk & Wagnalls Company, Harper & Brothers, Henry Holt and Charles Holt co-partners, doing

business under the firm name of Henry Holt & Company, George H. Mifflin, James M. Kay, Henry A. Houghton, Oscar R. Houghton, Albert F. Houghton, Lucy H. Valentine, co-partners, doing business under the firm name of Houghton, Mifflin & Company, McClure, Phillips & Company, Macmillan Company, New Amsterdam Book Company, James Pott and James Pott, Jr., co-partners, doing business under the firm name of James Pott & Company; G. F. Putnam's Sons, Robert H. Russell, Charles Scribner and Arthur H. Scribner, co-partners, doing business under the firm name of Charles Scribner's Sons; Frederick A. Stokes Company, Joseph F. Taylor, Rutger B. Jewett, co-partners, doing business under the firm name of J. F. Taylor & Company, Adolf Wessels, doing business as A. Wessels Company, Clarence E. Walcott, individually and as President of the American Booksellers' Association, a voluntary unincorporated Association; Joseph W. Nichols, individually and as Secretary of the American Booksellers' Association; J. Wilson Hart, individually and as Treasurer of the American Booksellers' Association; Baker & Taylor Company, Fleming H. Revell Company, Fowler & Wells Company, Adolph Mackel and John Ammon, co-partners, doing business under the firm name of Leggat Brothers, William R. Jenkins, defendants respondents, wherein was drawn in question the construction of a clause or clauses of a Statute of the United States and the decision was against the right, title, privilege or exemption specially set up or claimed in such clause, a manifest error hath happened to the great damage of the said Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, as by their petition appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ so that you have the same at Washington in the District of Columbia, within thirty (30) days from the date hereof in the said Supreme Court; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and customs of the United States should be done.

Witness the Hon. John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, this 8th day of November, in the year of our Lord, one thousand nine hundred and ten.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

HORACE H. LURTON,

*Associate Justice of the Supreme Court
of the United States.*

Dated Nov. 3, 1910.

[Endorsed:] Supreme Court of the United States Isidor Straus & Nathan Straus composing the firm of R. H. Macy & Company, Plaintiffs in error against American Publishers' Asso. et al. Defendants in error. Original. Writ of Error. Edmond E. Wise, Solicitor for plaintiffs in error (Corn Exchange Bank Bldg.), 19 William Street, New York. Received Nov. 11, 1910. Wm. F. Schneider, Clerk of the Supreme Court.

Copy of within writ received this 11th day of November 1910.

KENNESON, CRAIN, EMLEY & RUBINO,

Attorneys for Am. Booksellers' and Others.

OLIN, CLARK & PHELPS,

Attorneys for American Publishers Association.

CITY & COUNTY OF NEW YORK, ss:

Harold H. Richmond being duly sworn deposes and says that he is a clerk in the employ of Edmond E. Wise, the solicitor for the plaintiff in error herein, that on the 11th day of November 1910 he served a true copy of the within writ on Stephen H. Olin, the attorney for the American Publishers' Asso. and on Kenneson, Crain, Emley & Rubino, the attorneys for the American Bookseller's Asso.

HAROLD H. RICHMOND.

Sworn to and subscribed before me this 11th day of November 1910.

CLIFFORD H. OWEN,

Notary Public, No. 44, New York County.

STATE OF NEW YORK,

County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York, for the County of New York.

I, Wm. F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York, for the said County of New York, by virtue of the annexed writ of error which was served upon me on the Eleventh day of November 1910 and in obedience thereto, do hereby certify that the foregoing Pages Numbered from 1 to 210 inclusive contain a true and complete transcript of the record and proceedings had in said Court in the suit — Isidor Straus and others vs. American Publishers' Association and others mentioned in said writ of error as the same remain of record and on file in my office and that annexed hereto is the petition for the said writ of error the Assignment of Errors the citation to the writ of error with proof of service of the same, and said writ of error served upon me.

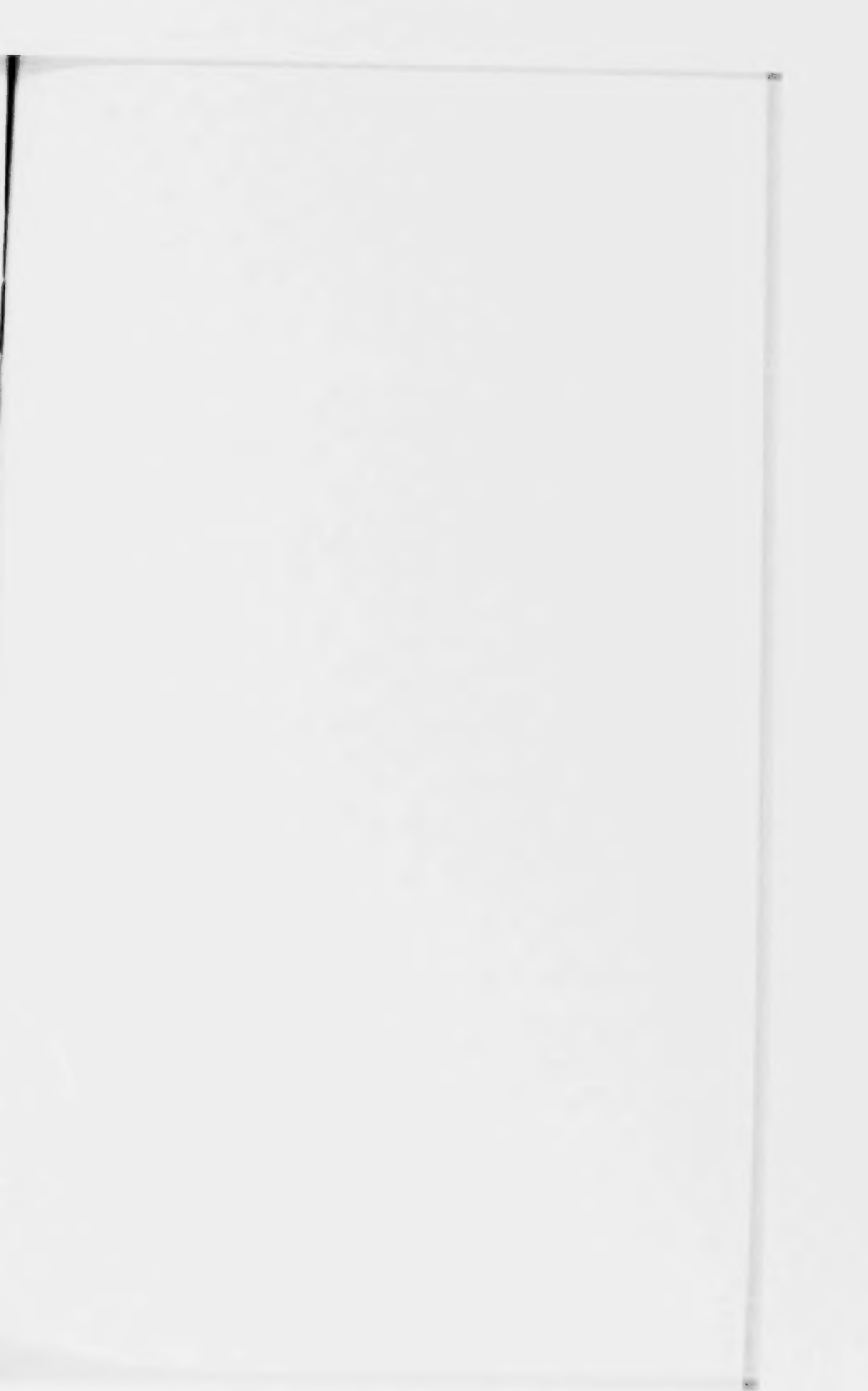
216 ISIDOR STRAUS ET AL. VS. AMERICAN PUBLISHERS' ASS'N ET AL.

In Testimony whereof I have caused the Seal of the said Court to be hereunto affixed at my office in the City and County of New York, on the —,

[New York Seal.]

WM. F. SCHNEIDER, *Clerk*.

Endorsed on cover: File No. 22,408. New York Supreme Court, Term No. 787. Isidor Straus and Nathan Straus, composing the firm of R. H. Macy & Company, plaintiffs in error, vs. American Publishers' Association et al. Filed November 17th, 1910. File No. 22,408.



Office Supreme Court, U. S.
FILED.

FEB 24 1913

JAMES H. McKENNEY

CLERK

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 129

ISIDOR STRAUS and NATHAN STRAUS, Com-
posing the Firm of R. H. MACY & Co.,
Plaintiffs-in-Error,
against

AMERICAN PUBLISHERS' ASSOCIATION,
et al.,
Defendants-in-Error.

MOTION BY PLAINTIFFS-IN-ERROR FOR POSTPONEMENT
OF ARGUMENT TO OCTOBER TERM, 1913.

WALLACE MACFARLANE,
Of Counsel for the Motion.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 172.

ISIDOR STRAUS and NATHAN
STRAUS, composing the firm of
R. H. MACY & COMPANY,

Plaintiffs-in-Error,

against

AMERICAN PUBLISHERS' ASSOCIA-
TION, *et al.*,

Defendants-in-Error.

2

IN ERROR TO THE SUPREME COURT OF THE STATE OF
NEW YORK.

*Motion in Behalf of Plaintiffs-in-Error for a Post-
ponement of Argument to October Term, 1913.*

Wallace Macfarlane, of Counsel, for the Mo-
tion.

3

MOTION.

Isidor Straus and Nathan Straus, composing the
firm of R. H. Macy & Company, plaintiffs-in-error,
pray that the argument in this cause may be post-
poned until October Term, 1913.

4 Please take notice that on Monday, the 24th day of February, 1913, at the opening of the Court, or as soon thereafter as counsel can be heard, a motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Annexed hereto is a copy of the affidavits to be submitted with the said motion in support thereof.

WALLACE MACFARLANE,
Of Counsel for the Above Designated
Plaintiffs-in-Error for the Purposes
of this Motion.

5

To:

The Clerk of the Supreme Court of the
United States,

and to

OLIN, CLARK & PHELPS, Esqs.,
Attorneys for Defendants-in-Error.

SUPREME COURT OF THE UNITED STATES. 7

OCTOBER TERM, 1912.

No. 172.

ISIDOR STRAUS and NATHAN
STRAUS, composing the firm of
R. H. MACY & COMPANY,

Plaintiffs-in-Error,

against

AMERICAN PUBLISHERS' ASSOCIA-
TION, *et al.*,

Defendants-in-Error.

x

STATE OF NEW YORK, } ss:
COUNTY OF NEW YORK, }

ISAAC LANDE, being duly sworn, says: That he is the managing clerk in the office of Edmond E. Wise, who is solicitor and of counsel for the plaintiffs-in-error in the above-entitled action.

The affidavits in support of the motion were drafted by deponent, who being unfamiliar with the practice of the Supreme Court on such motions, caused the affidavits to be typewritten instead of printed. That the typewritten affidavit of Mr. Edmond E. Wise was duly sworn to by him on the 11th day of February, 1913, and that he sailed for Naples on the steamship "Berlin" on the 15th day of February, 1913.

9

Copies of the typewritten affidavits were duly served on the attorneys for the defendants-in-error, and the originals, with proof of service, were sent

- 10 to the Clerk of this Court on the 15th day of February, 1913. Deponent's attention was then called by the clerk to the fact that the practice of the Court required the motion papers to be printed. Owing to the departure of Mr. Wise, it was impracticable to obtain another original affidavit from him, but the printed papers are accurate copies of the original typewritten affidavits on file in the office of the Clerk of this Court.

ISAAC LANDE.

- 11 Sworn to before me this 19th
day of February, 1913.

CLIFFORD H. OWEN.

Notary Public,
New York County.

UNITED STATES SUPREME COURT.

13

OCTOBER TERM, 1912.

No. 172.

ISIDOR STRAUS and NATHAN
 STRAUS, composing the firm of
 R. H. MACY & COMPANY,
 Plaintiffs in-Error,

against

AMERICAN PUBLISHERS' ASSOCIA-
 TION, *et al.*,
 Defendants-in-Error.

14

STATE OF NEW YORK, {
 CITY AND COUNTY OF NEW YORK, } ss:

EDMOND E. WISE, being duly sworn, deposes and
 says: That he is the solicitor and one of the coun-
 sel for the plaintiffs in-error in the above-entitled
 action, and has been such since the commencement
 thereof. That this action was commenced in De-
 cember, 1902, in the Supreme Court of the State
 of New York, to enjoin the defendants from carry-
 ing on an unlawful combination and conspiracy in
 restraint of intra-state and inter-state trade, in
 books, in violation of both the State and Federal
 anti-trust acts, against the rights and interests of
 the plaintiffs as retail booksellers, by combining
 and conspiring to maintain a fixed price for such
 books, and to restrain competition in the sale and
 price thereof, and in the supply of all books; to
 prevent the plaintiffs from trading therein and to

15

- 16 destroy their business as such booksellers, and for damages sustained.

The action was strongly contested in the State Court, was twice heard on appeal to the Court of Appeals, and a writ of error from this Court to the Supreme Court of the State of New York to review the final decision of the Court of Appeals was obtained in October, 1910, and as soon thereafter as practicable, the cause was placed upon the calendar of this court. It was numbered 787 on the October Term, 1910, Number 439 on the October Term, 1911, and Number 172 on the October Term, 1912. Throughout the litigation and until his death, Hon. JOHN G. CARLISLE was associated as counsel with deponent, and was thoroughly familiar with the complicated facts involved, and the history of the litigation. After his death deponent did not have any counsel associated with him until February, 1912, when a motion was made in this court by the defendants-in-error to dismiss the writ or affirm the judgment for lack of jurisdiction to review the questions presented by the record. When that motion was made, deponent was actively engaged in the trial of an equity cause in the Supreme Court of the State of New York, which occupied approximately thirty days, and was in addition in ill health, and he secured the services of Mr. Wallace Macfarlane, as counsel, to prepare the brief on the jurisdictional question presented on that motion. This Court decided to reserve the jurisdictional question for further argument when the cause was reached in its regular order on the calendar.

Deponent thereafter became seriously ill, and in June, 1912, was compelled to submit to a second and severe operation, which greatly sapped his phy-

sical powers, and forced him practically to give up 19
 business matters for upwards of three months.
 Thereafter, upon his return to his office he was
 seized with violent and apparently chronic stomach
 troubles, and was directed by his physicians, whose
 affidavits are hereto annexed, to suspend his busi-
 ness activities and to go to Europe for a complete
 rest. Owing to deponent's desire to be present at
 the argument of this case, and the fact that his
 familiarity with all its ramifications could not be
 communicated in detail to any other counsel, he
 refused to leave until the case had been argued, as
 he expected it to be reached on the calendar about 20
 the beginning of January, and he secured passage
 for himself for Europe on the steamship "Fran-
 conia," which sailed on January 18th, 1913. Several
 briefs were filed by deponent in which Mr. Macfar-
 lane co-operated, who, however, paid attention most-
 ly to the jurisdictional points and relied upon this
 deponent for the statements of facts and the argu-
 ments of the main question based thereon. On
 inquiry at the office of the Clerk of the Supreme
 Court during December, deponent ascertained that
 the cause could not be reached before the end of
 January. He thereupon cancelled his passage, and
 took passage on the steamship "Berlin," which sails 21
 on February 15th, 1913. Unfortunately, No. 172
 just missed being reached for argument at the Jan-
 uary Session.

This deponent is urged by his physicians not to
 delay his departure any longer and is advised that
 his health will be in grave danger if he does.

Application was made to counsel for the defend-
 ants-in-error to consent to the postponement of
 the argument till the next term, but such consent
 was refused.

22 The facts and history of this litigation are very involved. As stated in the brief of counsel for the defendants on the motion to dismiss the writ of error (page 13); eighteen opinions have been rendered in the State Court at different times during the progress of the action. There have also been several collateral decisions intimately connected with the case, such as *Robbs, Merrill v. Straus* and *Scribner v. Straus*, reported in 210 U. S. Deponent feels that upon the argument, his knowledge of the facts and of the surrounding circumstances will prove of great assistance to the Court, and aid it in understanding the questions involved, and that the plaintiffs-in-error will be greatly prejudiced if the case has to be argued in deponent's absence.

23

Deponent will return from Europe in June, 1913, and no possible injury can be inflicted upon the defendants in error if the argument of this case be postponed until the next term. Defendants have not appealed and there is no injunction against them outstanding in respect to the matters which plaintiffs seek to review by the writ of error herein.

Deponent therefore respectfully asks that the argument of this case be postponed until the October, 1913, Term.

24

EDMOND E. WISE.

Sworn to before me this 14th
day of February, 1913.

ISAAC LANDE,
Commissioner of Deeds,
New York City.

IN THE UNITED STATES SUPREME COURT. 25

OCTOBER TERM, 1912.

No. 172.

ISIDOR STRAUS and NATHAN
STRAUS, composing the firm of
R. H. MACY & COMPANY,

Plaintiffs-in-Error,
against

AMERICAN PUBLISHERS' ASSOCIA-
TION, *et al.*,
Defendants-in-Error.

26

STATE OF NEW YORK, {
CITY AND COUNTY OF NEW YORK, } ss.:

HENRY HERMAN, being duly sworn, says:

That he is a duly licensed physician entitled to practice within the State of New York, and resides at 937 Madison Avenue, in the Borough of Manhattan, City and State of New York. That he is well acquainted with Edmond E. Wise, one of counsel in the above-entitled action, and for the last year and a half has treated him professionally for his present ailment. During that time Mr. Wise has undergone two distinct operations which were serious in their nature, as well as extremely painful. In addition thereto, Mr. Wise has suffered with chronic stomachic trouble, with the result that his health has been considerably undermined, and his condition has become decidedly anaemic. He is furthermore on the border of a nervous breakdown, and has been urged by your deponent and other physicians to take an imme-

27

28 diate and prolonged rest. That your deponent, as the personal physician of Mr. Wise, has urged upon him the necessity of a complete cessation from all business affairs and an extended trip where he could have a complete rest. That it was only after considerable urging that your deponent was able to induce Mr. Wise to arrange for a passage for Europe on January 18th, 1913, and that Mr. Wise's cancellation of this passage and postponement of the trip was against the strongest advice of your deponent. That because of the failure of Mr. Wise to take this complete rest when advised, the time
29 has now arrived when it is imperative that he cease work immediately and take the rest as he has been repeatedly urged.

Your deponent is further of the opinion that if Mr. Wise were to continue at the present time with his business affairs, it would considerably impair his health, and without doubt would affect him most seriously.

That to your deponent's own knowledge, Mr. Wise was operated on during this period by Dr. James P. Tuttle of the City of New York, now deceased, and Dr. John F. Erdman. That he has also been in consultation with Dr. Jacob Kaufman
30 of the City of New York.

Your deponent has no hesitancy in stating that it is imperative that Mr. Wise immediately leave the city on an extended trip for a prolonged rest if his health is to be safeguarded.

HENRY HERMAN.

Sworn to before me this 14th
day of February, 1913.

ISAAC LANDE,

Commissioner of Deeds,
New York City.

IN THE UNITED STATES SUPREME COURT. 31

OCTOBER TERM, 1912.

No. 172.

ISIDOR STRAUS and NATHAN
STRAUS, composing the firm of
R. H. MACY & COMPANY,
Plaintiffs-in-Error,

against

AMERICAN PUBLISHERS' ASSOCIA-
TION, *et al.*,
Defendants-in-Error.

32

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss:

JACOB KAUFMAN, being duly sworn, says: That he is a duly licensed physician entitled to practice within the State of New York, and has his office at No. 52 East 58th Street, in the Borough of Manhattan, City of New York. That he is personally acquainted with Edmond E. Wise, one of counsel in the above-entitled action, and has rendered professional services to him. That some months ago your deponent was called in consultation by Dr. Henry Herman for the treatment of Mr. Wise, and knows of his own knowledge that Mr. Wise has undergone two distinct operations of a very serious nature. Your deponent further knows that Mr. Wise is now suffering from chronic stomache trouble; that his health is considerably undermined; that his condition is anaemic; that he is on

33

34 the border of a nervous breakdown, and requires a prolonged rest and freedom from business cares.

Mr. Wise has repeatedly been urged by your deponent to take an extended trip for a prolonged rest, as this treatment is in the opinion of your deponent most necessary if a complete breakdown is to be avoided. Deponent believes that Mr. Wise should have temporarily retired from practice some time ago, and his failure to do so has been at the expense of his health, which is now considerably impaired, and that any further delay in taking the rest as advised and prescribed, is in the opinion of
 35 your deponent, apt to result most seriously.

JACOB KAUFMAN.

Sworn to before me this 11th
 day of February, 1913.

ISAAC LANDE,

Commissioner of Deeds,
 New York City.

Office Supreme Court,
FILED.

FEB 24 1913

JAMES H. McKEN

Supreme Court of the United States

October Term, 1912

No. **129**

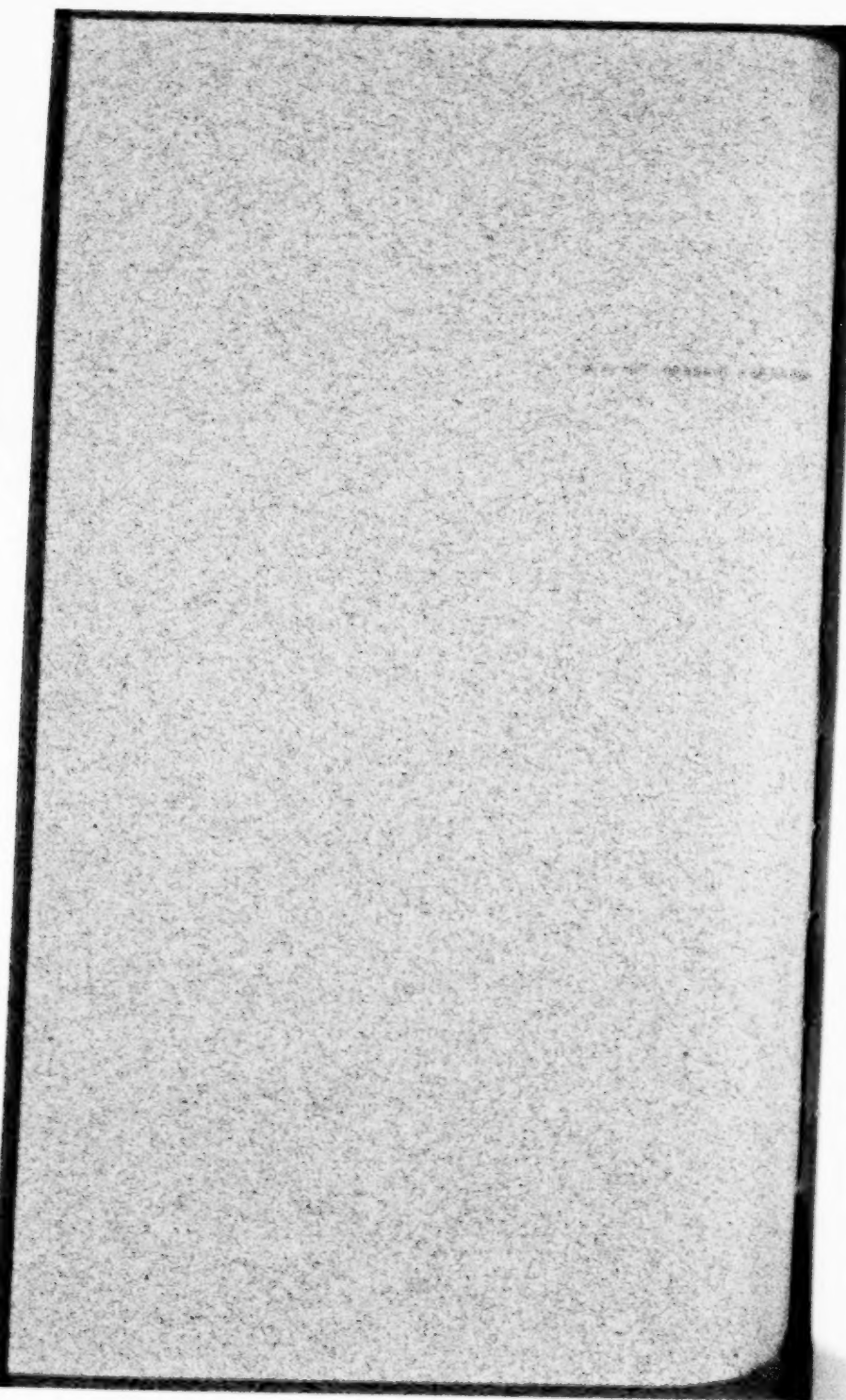
ISIDOR STRAUS and Another, composing the firm
of R. H. Macy & Co.,
Plaintiffs and Plaintiffs in Error
against

AMERICAN PUBLISHERS' ASSOCIATION and
Others,
Defendants and Defendants in Error

**Affidavit and Brief in Support of Affidavit of
Defendants in Error in Opposition to
Postponement of Argument**

OLIN, CLARK AND PHELPS,
Attorneys for Defendants.

STEPHEN H. OLIN,
Of Counsel.



Supreme Court of the United States,

OCTOBER TERM, 1912—No. 172.

ISIDOR STRAUS and NATHAN
STRAUS, composing the firm of
R. H. MACY & COMPANY,
Plaintiffs-in-Error.

against

AMERICAN PUBLISHERS' ASSOCIA-
TION, *et al.*,
Defendants-in-Error.

Affidavit to be Read in Opposition to Motion on Behalf of Plaintiffs-in- Error for the Postponement of Argument to October, 1913.

STATE OF NEW YORK,)
City and County of New York,) ss.:

STEPHEN H. OLIN, being duly sworn, deposes and says: that he is a member of the firm of Olin, Clark & Phelps, the attorneys for the defendants-in-error, and from the beginning of this litigation has been of counsel for the American Publishers' Association and the other defendants-in-error; that deponent has prepared himself to take part in the oral argument when the case is reached; and that Mr. John G. Milburn has also made preparation to take part in the argument as coun-

sel for the defendants-in-error. That no application was made to deponent or to the attorneys for the defendants-in-error for their consent to postpone the case before Thursday, February 13th inst., when a clerk from the office of Mr. Wise called upon deponent and said that Mr. Wise had been ill for a number of months and wished to go to Europe on Saturday, the 15th February; that deponent then said that he saw no reason, on the facts as stated to him, why Mr. Wise should not postpone his trip to Europe for three weeks. On Friday, February 14th, deponent declined to consent to the postponement.

S. H. OLIX.

Sworn to before me this 19th/
day of February, 1913. }

RICHARD H. PARKS,
(SEAL) *Notary Public*,
Queens County.

Certificate filed in New York County, No. 63.

SUPREME COURT OF THE UNITED
STATES.

October Term, 1912.

No. 172.

ISIDOR STRAUS and NATHAN
STRAUS, composing the firm of
R. H. Macy & Company,
Plaintiffs-in-error,

against

AMERICAN PUBLISHERS ASSOCIA-
TION, et al.,
Defendants-in-error.

**Brief in Support of Affidavit to be Read
in Opposition to Motion on Behalf of
Plaintiffs-in-Error for the Postpone-
ment of Argument to October, 1913.**

Counsel for the defendants-in-error respectfully oppose the granting of the motion to postpone the argument in the above entitled action to the October Term, for the following reasons:

First.—We submit that in the absence of Mr. Wise, plaintiffs are sufficiently represented by counsel abundantly able to argue the case in this Court. Mr. Macfarlane is a member of the bar of high standing and of great experience in the argument of causes. He has had adequate opportunity to become conversant with the facts and law of this case. He has been of counsel for the plaintiffs-in-error for more than a year, and he has, according to Mr. Wise's affidavit, made or

participated in making, the three briefs which have been filed on behalf of the plaintiffs in this Court. The argument must necessarily be based upon the record and the statement of facts thought important by Mr. Wise and Mr. Macfarlane has been fully made in the briefs which they have filed. No new facts can be presented by either party and there is no reason why the case cannot be properly argued by Mr. Macfarlane.

Second.—The affidavits, while showing the serious illness of Mr. Wise and the desirability of his taking a rest from his work, do not show that he is now unable to appear in Court or that it would have been dangerous to his health if he had postponed his trip to Europe until after the argument, which will probably take place at an early day during this sitting of the Court. The carefully chosen language of the affidavits of the medical men in no way shows that there would have been special danger if Mr. Wise, while refraining from the ordinary business of his office, had yet held himself in readiness to take part in the argument, and there is no proof that postponing his trip to Europe, under these circumstances, would have been likely to injure him.

Third.—It would be a serious detriment to the numerous defendants in this case to postpone for more than seven months a hearing in this action. We submit to the Court that the continued pendency of so large a claim against a number of partnerships and corporations, of which the composition changes from time to time, is a serious burden which ought not to be continued without strong reasons. If a new trial of this case were granted, it would require the examination of facts occurring in 1900 and 1901. The lapse of a

further period of seven months would add to the difficulty of proof.

Fourth.—While we have strong sympathy with Mr. Wise, we submit that the convenience of counsel for the defendants-in-error should not be wholly disregarded. Without any notice of any intention on the part of the plaintiffs-in-error to ask for a postponement, we have made preparations for argument upon a day shortly after the 24th of February. No reason is suggested in the affidavits why we were not sooner advised of Mr. Wise's plan of going abroad. A postponement for seven months would require new preparation for argument on our part. Before the October Term, sickness or accident may deprive the defendants of the service of their counsel. The defendants should not be called upon to take the risk of sickness on both sides of the case.

Respectfully submitted,
STEPHEN H. OLIN,
Of Counsel.

19

7

Supreme Court of the United States,

OCTOBER TERM, 1911.

~~1910~~

Supreme Court, U. S.
FILED.

JAN 26 1912

JAMES H. MCKENNEY
CLERK

ISIDOR STRAUS and NATHAN STRAUS, com-
posing the firm of R. H. Macy & Company,

Plaintiffs in Error,

vs.

AMERICAN PUBLISHERS ASSOCIATION, et al.,

**In Error to the Supreme Court of the State of
New York.**

**MOTION TO DISMISS THE WRIT OF ERROR OR
AFFIRM THE JUDGMENT.**

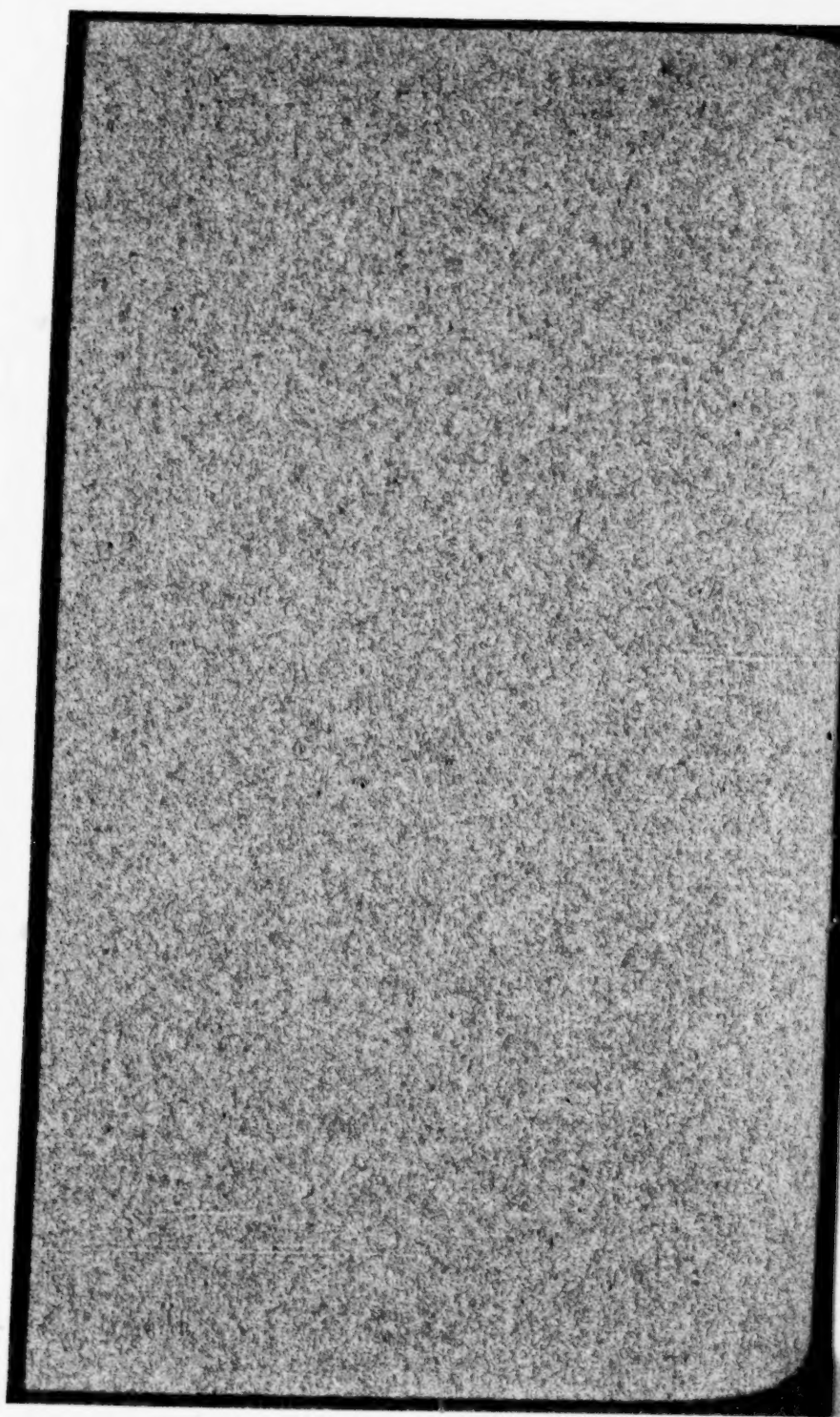
STEPHEN H. OLIN,

Of Counsel for the motion,

34 Nassau Street,

New York City.

**CHAS. P. YOUNG CO.,
LAW REPORTERS AND PRINTERS,
19 Beaver St., New York**



Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 439.

ISIDOR STRAUS and NATHAN
STRAUS, composing the firm of
R. H. Macy & Company,
Plaintiffs in error,

against

AMERICAN PUBLISHERS' ASSOCIA-
TION, *et al.*,
Defendants in error.

IN ERROR TO THE SUPREME COURT OF
THE STATE OF NEW YORK.

**Motion to dismiss or affirm and brief
submitted on behalf of the American
Publishers' Association and the de-
fendants sued as "publishers."**

STEPHEN H. OLIN, of counsel, for the motion.

Motion.

The American Publishers' Association and the other defendants sued as publishers pray that the writ of error in this cause may be dismissed for want of jurisdiction or that the judgment and decree of the court below may be affirmed on the ground that the question on which such jurisdiction depends is so frivolous as not to need further argument.

Please take notice that on Monday, the nineteenth day of February, 1912, at the opening of the Court, or as soon thereafter as counsel can be heard, a motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, for the decision of the said Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

STEPHEN H. OLIN,
Of counsel for the above designated defendants for the purposes of this motion.

To

THE CLERK OF THE SUPREME COURT OF THE
UNITED STATES;

and to

EDMOND E. WISE, ESQ.,
Counsel for plaintiff in error;

MESSRS. KENNESON, CRAIN & RUBINO,
Counsel for certain defendants.

Facts and History of the Cause.

The plaintiffs in error, on December 3, 1902, sued in the Supreme Court of the State of New York against the American Publishers' Association, a membership corporation, and certain persons, firms and corporations, members of the said association and designated as "publishers," and the President of the American Booksellers' Association, a voluntary unincorporated association, and certain members of that association designated as "dealers."

The complaint alleged the formation in the year 1900 of the American Publishers' Association, in-

cluding 95% of the publishers in the United States

"unlawfully, illegally and contrary to the public policy and the statutes of the State of New York and of the United States, more especially of certain statutes of the United States passed July 2, 1890, and more particularly described as 'An Act to protect trade and commerce against unlawful restraints and monopolies' and set forth in full at page 762 of Volume 1 of the Supplement to the Revised Statutes of the United States" (p. 17).

There was no other reference to the Federal anti-trust act and no allegation that the acts of the defendants restrained interstate commerce.

It was alleged that certain resolutions were passed by the American Publishers' Association (pp. 18, 19).

The resolutions are contained in Exhibit A (p. 44) and the particular resolutions complained of are the following:

"I.—That the members of the American Publishers Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

• • • • •

"III.—That the members of the Association agree that such net copyrighted books and all other of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale."

By an amendment to the rules, reference was made to works of fiction. (Exhibit 13, p. 47.)

"IV.—That the members of the Association agree that on all copyrighted works of fiction (not net) published by them after February 1, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. * * *

Exhibits C, D, E and F (pp. 50-65) amended the rules in particulars not important on this motion.

It was alleged that the American Booksellers' Association was formed by about 90% of all dealers to co-operate with the American Publishers' Association in the enforcement of its rules. That the plaintiffs carry on a department store and therein sell books at retail. That they refused to sell copyrighted books at the net prices fixed by

the respective publishers and therefore their supply of books published by members of the American Publishers' Association was cut off to their damage. Thereupon the plaintiffs asked for an injunction and damages.

The defendants demurred to the complaint and the demurrers were sustained. On appeal, the Appellate Division overruled the demurrers. On appeal taken by permission, the Court of Appeals sustained the judgment of the Appellate Division, on the ground that while the rules of the American Publishers' Association were not unlawful so far as copyrighted books were concerned, they were unlawful under the New York anti-monopoly statute, because they also affected the supply of uncopyrighted books.

Parker, *C. J.*, quoted from *Bement v. National Harrow Company*, 186 U. S., 70, the following passage:

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal,"

and continued:

"That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement

attacked in this action; and it points to the principle underlying the decision in *Park & Sons Co.* case, 175 N. Y., 1, upon which the defendants apparently rest their claim that the judgment of the Appellate Division should be reversed." *Straus v. American Publishers' Co.*, 177 N. Y., 473.

With so much of this opinion, the judges of the Court of Appeals were all in agreement, but in regard to applying the state anti-monopoly statute to dealings in uncopyrighted books, the court was divided. The majority, with Parker, C. J., construed the statute strictly and literally and held the agreement unlawful as to such dealings, while Gray and Bartlett, JJ., considered the agreement lawful, citing, among other cases, *Anderson v. U. S.*, 171 U. S., 604.

The New York anti-monopoly statute is Chap. 690, Laws 1899; General Business Law, 340-346. The relevant section is in the margin. §

340 Contracts for monopoly illegal and void.

Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this State of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this State in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity, the free pursuit in this State of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.

After the decision of the Court of Appeals and about April 11, 1904, the American Publishers' Association amended its rules to conform to the decision of the Court of Appeals and particularly by providing that such rules should apply only to copyrighted books, and the American Booksellers' Association adopted a resolution to the same effect. Findings 56, 57; Exhibit G, p. 196; Exhibit I, p. 111.

The defendants then served answers setting up as a second separate defense the amended rules, and the plaintiffs' demurrer to this defense was overruled and withdrawn, pp. 36-39; *Straus v. American Pub. Ass'n*, 45 Misc., 255; 103 App. Div., 277.

The issues thus framed were tried before Hon. Victor J. Dowling, a Justice of the Supreme Court, who, on Nov. 19th, 1907, filed a decision containing 98 findings of fact and 14 conclusions of law. It was decided that the agreements and resolutions complained of were "unlawful and contrary to the laws of 1899, Chap. 690, so far as they related to uncopyrighted books," and that the plaintiffs were entitled to judgment:

"I.—Restraining interference with their purchases or sale of uncopyrighted books.

"II.—To such damages in the purchase or sale of books as they may have suffered by reason of the unlawful combination entered into by the defendants on the 13th day of February, 1901, from May 1st, 1901, and that a referee be appointed to ascertain the amount of such damages."

On November 20, 1907, an interlocutory judgment in favor of the plaintiff was entered accordingly. It recited that the combination was unlawful so far as it related to uncopyrighted books and in contravention of the statute in such

case made and provided. An injunction was granted forbidding interference with dealings in uncopyrighted books, and it was adjudged and decreed that the plaintiffs are entitled to recover damages from the defendants and each of them, which they have sustained in any manner whatsoever by reason of the defendants' unlawful acts in the premises (pp. 113-142, 136, 137).

The opinion of Dowling, *J.*, is found at page 171 of the record.

The plaintiffs appealed to the Appellate Division from so much of the interlocutory judgment as failed to grant relief concerning copyrighted books. The Appellate Division, on October 20, 1908, affirmed the interlocutory judgment on the authority of 177 N. Y., 473 (pp. 173-181), and granted permission to the plaintiffs to appeal to the Court of Appeals, certifying to that Court the following question:

"Are the plaintiffs under the findings of fact contained in the decision in this case, entitled, in so far as copyrighted books are concerned, to the relief demanded in the complaint, or to any relief as against the defendants in this case?" (p. 544.)

On December 8, 1908, the order of the Appellate Division was affirmed in the Court of Appeals, three judges dissenting, and the question certified was answered in the negative (pp. 183-191, 193 N. Y., 496).

The referee named in the interlocutory judgment reported the amount of damages, and final judgment was entered in favor of the plaintiffs for an injunction and \$3673.60 damages and costs.

The plaintiffs appealed from portions of this judgment directly to the Court of Appeals.

The Court of Appeals affirmed the judgment below (Record, p. 203) and the remittitur was filed

and judgment thereon entered in the Supreme Court on October 15, 1910.

A writ of error was filed November 17th, 1910.

Federal Questions.

1. It was alleged in paragraph Fifteen of the complaint that the defendants

"unlawfully, illegally and contrary to the public policy and the statutes of the State of New York and of the United States, more especially of certain statutes of the United States passed July 2, 1890, and more particularly described as 'An Act to protect trade and commerce against unlawful restraints and monopolies' * * * combined and associated themselves together."

The Supreme Court, the Appellate Division and the Court of Appeals held the combination unlawful as to uncopyrighted books, and thus the decision was not against the right or privilege set up or claimed in the complaint, except that as to a part of the subject matter it was held that lawful monopolies are not controlled by statutes against unlawful monopoly.

2. The defendants set up in their answer that "the plan, rules, resolution or agreement of the American Publishers' Association do not now affect or relate to the sale or price of any book except books copyrighted under the statutes of the United States, as to which the owners of the several copyrights have and enjoy a lawful monopoly; that by the Constitution and statutes of the United States, the above named defendants (other than the American Publishers' Association) have in regard to books copyrighted and published by them respectively, the sole liberty of printing, publishing and vending the same,

and that in regard to all the matters alleged in the complaint and in the conduct of business by these defendants, they were acting in all respects in accordance with the laws of the State of New York and of the United States of America" (pp. 38, 39).

The right, privilege or immunity thus specially set up and claimed, was controverted from the beginning to the end of the litigation. It was the principal subject of all opinions rendered by courts and judges. The decision of the Supreme Court and of the Court of Appeals was in favor of the right, privilege and immunity thus specially set up and claimed by the defendants.

3. The five assignments allege a single error under different aspects.

Assignments II and IV, in effect, assert that the state court erred in sustaining, as against the Federal anti-trust act, the right, privilege and immunity set up and claimed by the defendants under the copyright law.

Assignments I, III and V, in effect, assert that the court erred in not holding the combination, in so far as concerns copyrighted books, unlawful under the Federal anti-trust act.

The assignments of error ignore the fact that the suit was brought to declare the combination unlawful, illegal and contrary to the public policy and the statutes of the State of New York and of the United States.

If this court has jurisdiction to consider the errors assigned, it must be because the plaintiffs, in the state courts, specially set up or claimed a right or privilege, under the Federal anti-trust act, to maintain the action as to dealings with copyrighted books.

No such right or privilege was specially claimed in the complaint. The allegation there was that the combination was unlawful, illegal and contrary to the public policy and the statutes of the State of New York *and* of the United States and especially of the Federal anti-trust act.

The trial court found the agreements and resolutions to be unlawful and contrary to the (New York) Laws of 1899, Chapter 690, so far as they related to uncopyrighted books, and lawful so far as they related to copyrighted books (pp. 136, 137).

The court refused to find at the request of the plaintiffs that the agreements affected interstate commerce and were unlawful under the Federal anti-trust act (p. 162).

The court also refused proposed findings, which, in identical terms, claimed

"that the owners of several separate copyrights are not empowered to enter into any contract or agreement or combination between themselves concerning the supply and price of books published under their separate copyrights which would be unlawful and contrary"

respectively to the state statute (VIII) and Federal statutes (IX).

To this refusal the plaintiffs excepted, pp. 163, 168, 169.

The plaintiffs appealed to the Appellate Division from specified parts of the judgment, including

"so much of said judgment as failed or refused to hold that the combinations, agreements or resolutions of the two defendant associations and their respective members were wholly contrary to the statute law of

the State of New York, more particularly of the Laws of 1899, Chapter 690, and the statute laws of the United States, more particularly of the statute passed on July 2, 1890, known as 'An Act to protect trade and commerce against unlawful restraints and monopolies,' in so far as concerned copyrighted books," p. 175.

The judgment was affirmed and the Appellate Division granted leave to the plaintiffs to appeal to the Court of Appeals, certifying to that court the following question of law:

"Are the plaintiffs, under the findings of fact contained in the decision of this case, entitled, in so far as copyrighted books are concerned, to the relief demanded in the complaint, or to any relief as against the defendants in this case?" p. 183.

The judgment appealed from was affirmed by the Court of Appeals and the question answered in the negative, and judgment was entered on the remittitur on December 14th, 1908, pp. 190, 191.

The damages having been assessed, final judgment in favor of the plaintiffs granting an injunction and \$3673.60 costs and damages, was entered May 20, 1909 (p. 201). The plaintiffs appealed to the Court of Appeals from specified portions of the judgment, including

"so much of said judgment as fails or refuses to hold that the combinations, agreements or resolutions of the two defendant associations and their respective members were wholly contrary to the statute law of the State of New York, more particularly of the laws of 1899, Chapter 690, and the Statute

Laws of the United States, more particularly of the Statute passed on July 2, 1890, known as 'An Act to protect trade and commerce against unlawful restraints and monopolies' in so far as concerns copyrighted books" (p. 5).

On September 27, 1910, the Court of Appeals affirmed the judgment below. (Record, p. 203.)

Eighteen opinions were rendered in the state courts, reported as follows:

Parker, *Ch. J.*, Gray and Bartlett, *JJ.*, 177 N. Y., 473;

Gray and Willard Bartlett, *JJ.*, 193 N. Y., 496;

Ingraham, *J.*, Van Brunt, *P. J.*;

McLaughlin, *J.*, 85 App. Div., 351;

O'Brien, *J.*, 96 App. Div., 315;

Ingraham and Laughlin, *JJ.*, 103 App. Div., 933.

Per Curiam—Ingraham, McLaughlin, *JJ.*, 127 App. Div., 935.

Blanchard, *J.*, 45 Misc., 251.

Dowling, *J.*, Record, p. 171.

Without opinion, the Court of Appeals denied a motion to reargue the appeal from the interlocutory judgment, 194 N. Y., 538; and affirmed the final judgment, 199 N. Y., 548.

Except as to matters of pleading and practice, the opinions are devoted to two questions—the right claimed by the plaintiffs under the New York anti-trust statute and the right, privilege and immunity claimed by the defendants under the copyright act.

There is no allusion in any of these opinions to any claim by the plaintiffs under the Federal anti-trust act.

POINTS.

I.

The court has no jurisdiction to review the decision of the state courts concerning the effect of the copyright act.

The plaintiffs in error claimed no title, right, privilege or immunity under the copyright act. The defendants claimed such a right, privilege or immunity, and the decision was in favor of their claim.

The right or privilege must be personal to the plaintiff in error, and he is not entitled to a review when the right or privilege was asserted by the other party and the decision was in favor of that party and adverse to himself. *Missouri v. Andriano*, 138 U. S., 496; *De Lamar's Nevada Gold Mining Co. v. Nesbitt*, 177 U. S., 523, 528; *Jersey City & B. R. Co. v. Morgan*, 160 U. S., 288; *Ryan v. Thomas*, 4 Wall., 603; *Commonwealth Bank v. Griffith*, 14 Pet. 56.

"That a Federal statute was construed unfavorably to one of the parties to the suit is no ground for jurisdiction by this court unless such construction was not only unfavorable, but was against the right, etc., specially set up and claimed under the statute. In that case the party setting up and claiming the right under the statute, which has been denied, can obtain a review here." *Kizer v. Texarkana & F. S. Ry. Co.*, 179 U. S., 199, 201; *Lynde v. Lynde*, 181 U. S., 183; *Baker v. Baldwin*, 187 U. S., 61; *Rue v. Homestead Loan & G. Co.*, 176 U. S., 121; *Fulton v. McAfee*, 16 Pet., 149; *Linton v. Stanton*, 12 How., 423; *Strader v. Baldwin*, 9 How., 260; *Barke v. Gaines*, 19 How., 328.

This court has, therefore, no jurisdiction to

review the decision of the state courts giving effect to the copyright statute.

II.

The plaintiffs in error did not specially set up or claim any right, privilege or immunity under the Federal anti-trust act, as to which there was a decision adverse to the right or privilege claimed.

The complaint claimed that the agreement therein recited was unlawful under the state laws and the Federal statute. The decision was that the agreement was unlawful under the state statute. Hence, the decision was not against the right claimed, although the court did not rest it upon the Federal statute.

Furthermore, the right claimed under the Federal statute was not specially set up or claimed, since in the claim as made was involved a non-Federal claim made under the public policy and statutes of New York. *Pierce v. Somerset Rwy.*, 171 U. S., 641; *Allen v. Arguimbau*, 198 U. S., 149; *Dibble v. Bellingham Bay Land Co.*, 163 U. S., 63; *Klinger v. Missouri*, 13 Wall., 257; *Eustis v. Bolles*, 150 U. S., 361, 366; *Johnson v. Risk*, 137 U. S., 300.

In these cases the court refused to take jurisdiction when the right claimed under the Federal law was or might have been denied on a non-Federal ground.

A fortiori this court will not take jurisdiction when the right was claimed under both state and Federal law and the claim was *sustained* under the state law as to so much of the subject matter as could, in the view of the court, be affected by an anti-monopoly act.

III.

No right under the Federal anti-trust act in relation to copyrighted books was specially set up or claimed by the plaintiffs at any time before the filing of the assignments of error.

It has been shown that the complaint alleged that the agreement was unlawful under both the state and the Federal anti-trust acts. A single right was thus claimed resting upon a non-Federal and a Federal ground. On appeal from a judgment on demurrer, the complaint was sustained and the agreement was declared unlawful as to uncopyrighted books under the state statute, no allusion being made to the Federal statute. *Straus v. American Publishers' Association*, 85 App. Div., 446; 177 N. Y., 473. It was the duty of the trial judge to follow this decision and to allow the plaintiffs' claim under the state statute.

Therefore, if the plaintiffs claimed any right under the Federal law other or different from that claimed under the state law, they were bound to specify it. Their proposed findings V, VII and IX set forth the right claimed under the Federal law respectively as to the combination and the dealings in copyrighted books which were the subject of the suit. It may be conceded that if these proposed findings had stood alone they might have raised in the trial court the Federal question set forth in the assignments of error.

But proposed findings V, VII and IX did not stand alone. They were preceded by proposed findings II, VI and VIII, which claimed for the state statute precisely the same effect, both in regard to the combination and to dealings in copyrighted books, which was claimed in V, VII and IX for the Federal statute. There was no proposed finding claiming any right under both statutes taken together (Record, pp. 161-163).

The plaintiffs thus declared that their claim was supported by either their non-Federal right or their Federal right; that precisely the same results would be reached by considering the state statute alone or the Federal statute alone, and they did not claim that both statutes should be considered together. The proposed findings, in effect, acquiesced in the view which the appellate courts had taken that the rights claimed by the plaintiffs could be protected under the state law without considering the Federal law.

As might have been expected, the trial judge by his findings and opinion allowed the plaintiffs to recover under the state statute and he made no finding under the Federal statute and expressed no opinion about it. He said: "The issue herein is as to the construction of a New York statute (Chap. 690, Laws of 1899) and the Court of Appeals of this State having defined and determined the extent to which the acts complained of are in contravention of the statute, its decision is final and conclusive" (Record, p. 171).

The plaintiffs appealed from specified portions of the interlocutory judgment. If they had intended to dispute this position of the trial judge, or to raise a Federal question, they might have appealed from so much of the judgment as failed or refused to grant relief or to sustain their claim under the Federal anti-trust act; but they did, in fact, appeal from so much of the judgment as failed or refused to hold the combination unlawful under the state anti-trust act *and* the Federal anti-trust act in so far as concerned copyrighted books (p. 175).

They thus presented to the appellate courts, not a special claim of right under a Federal statute, but a claim of right under both state and Federal statutes as against the right, privilege

and immunity under the copyright law specially set up and claimed by the defendants and sustained by the court.

The notice of appeal from the final judgment was in the same language (p. 5).

This court has often refused to take jurisdiction when the decision of the state court was, or might have been, based upon a non-Federal question. These decisions apply with unusual force to this case where the Federal and non-Federal questions were confused in the complaint; where the plaintiffs, on the trial, claimed precisely the same rights whether the non-Federal question alone or the Federal question alone were decided; where the trial court decided only the non-Federal question; and where the plaintiffs presented the Federal and non-Federal questions to the appellate courts inextricably blended together, so that the Federal question was not and need not have been decided or considered in the Appellate Division or the Court of Appeals.

The court may examine the opinions rendered in the state courts in order to ascertain the ground of the judgment of the state court. *Dibble v. Bellingham Land Co.* 163 U. S. 63, 69; *Kreiger v Shelby Railroad Co.* 125 U. S. 39, 44.

As has been pointed out, the question suggested by the assignments of error is not mentioned in any of the eighteen opinions rendered. The claim of right under the copyright law made by the defendants is fully examined, but there is no allusion to any claim of Federal right by the plaintiffs, or to any limitation of the defendants' claim by reason of the Federal anti-monopoly law. The question at issue is always considered as involving only the New York anti-monopoly act and the copyright act.

As has been shown, the appellate courts were

not requested to examine the rights of copyright owners under the Federal anti-monopoly act apart from the state act. No special right under the Federal act was pointed out or distinctly claimed. The plaintiffs' claim under the Federal act was, at most, cumulative to that under the state act and no distinction between the acts was suggested.

As the record shows that no Federal question was at any time specially presented to the appellate courts by the plaintiffs, so the opinions show that no such question as is raised by the assignments of error was in fact considered or decided on either of the appeals. 177 N. Y., 473; 193 N. Y., 496; 194 N. Y., 538; 199 N. Y., 548.

This court has therefore no jurisdiction to examine the alleged errors assigned. *Klinger v. Missouri*, 13 Wall. 257; *De Saussure v. Gaillard*, 127 U. S. 216; *Johnson v. Risk*, 137 U. S. 300; *Bachtel v. Wilson*, 204 U. S. 36, 41; *Ark. So. R. R. v. German Bank*, 207 U. S. 271; *Leathe v. Thomas*, 207 U. S. 93; *Rogers v. Jones*, 214 U. S. 196; *Sauer v. New York*, 206 U. S. 536, 546; *Murdock v. Memphis*, 20 Wall. 590; *Hale v. Akers*, 132 U. S. 554; *Eustis v. Bolles*, 150 U. S. 361; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112; *Pierce v. Somerset Railway*, 171 U. S. 641; *Appleby v. Buffalo*, 221 U. S. 521.

The claim set up in the assignments of error was not by adequate specification presented to the Appellate Division or the Court of Appeals and, therefore, this court has no jurisdiction. Assignments of error in this court cannot enlarge the right of review. *Ches. & Ohio Ry. Co. v. McDonald*, 214 U. S., 191, 193.

The Federal question must have been brought before the highest state court "specially," that is unmistakably, and the right of this court to examine the judgment must arise from averments so

distinct and positive as to place it beyond question that the party bringing a case here intended to assert a Federal right. *Oxley Store Co. v. Butler County*, 166 U. S., 648, 655; *Capital City Dairy Co. v. Ohio*, 183 U. S., 238, 248.

So far as the record discloses, there was neither authority cited nor argument made in the Court of Appeals in support of the right now claimed. Hence there is no jurisdiction in this court. *Harding v. Illinois*, 196 U. S., 78.

Where the question has been treated as one of local law the mere fact that suit was brought under a Federal statute, does not necessarily involve a Federal question so as to authorize a writ of error from this court. *McMullen v. Ferrum Mining Co.*, 197 U. S., 343.

IV.

No inference of the denial of the Federal question raised in the assignments of error can be based upon the decision itself, because it might have rested upon other grounds broad enough to sustain it. For example:

The state courts might have disclaimed jurisdiction to enforce the Federal anti-monopoly act. For such a course authority may be found. *Locker v. American Tobacco Co.*, 121 App. Div., 443; aff'd on opinion below, 195 N. Y., 565; *State of Missouri v. Associated Press*, 51 L. R. A., 170.

Or the state courts might have refused to enforce the Federal anti-monopoly act in a suit in equity for an injunction, not brought by the United States. For this there is authority. *Minnesota v. Northern Securities Co.*, 194 U. S., 48; *Houston C. & C. Co. v. Norfolk & Western Ry. Co.*, 171 Fed., 723, 726; *Bludell v. Hagan Co.*, 54 F., 40; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.*, C. C. A.,

86 Fed., 407; *So. Ind. Exp. Co. v. U. S. Exp. Co.*, 88 F., 659, 92 Fed., 1022; *National Fireproofing Co. v. Mason Building Association*, C. C. A., 169 F., 259.

Or the state courts, having granted an injunction and damages under the state law, might have refused, in the same action, to apply the Federal statute, which has different provisions, relates to different subject matter and awards different relief, and especially when the claim under it was merely cumulative.

For such a refusal there would be abundant and obvious argument of convenience.

Or the state courts might have refused to make a finding that the defendants' acts restrained inter-state commerce because the complaint contained no allegation to that effect, unless such an allegation could be inferentially deduced from allegations framed to bring the case within the state statute.

On either of these grounds the state court might have rested so much of the judgment as the plaintiffs in error find fault with and, especially, the refusal to find proposed findings V, VII and IX.

"Unless a decision upon a Federal question was necessary to the judgment or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no Federal question, the same result must follow as a general rule." *Arkansas So. R. R. v. German Bank*, 207 U. S., 270, 275; *Bachtel v. Wilson*, 204 U. S., 36, 41; *Western Union Tel. Co. v. Wilson*, 213 U. S., 52, 53; *Bonner v. Gorman*, 213 U. S., 86; *California Powder Works v. Davis*, 151 U. S., 389.

V.

If it be assumed that the Federal question is before this court, the judgment should be affirmed because the decision of the Federal question (had it been decided) would have been plainly right, and, upon mere statement without argument, the assignments of error are seen to be frivolous.

To sustain either assignment of error it must appear, first, that the state courts were bound to enforce the Federal anti-monopoly act; second, that upon the facts found, the defendants' agreement and combination were unlawful under the Federal act, and third, that the Federal act prohibited the agreement so far as it affected copyrighted books.

1.—We submit that there is nothing in the Federal anti-trust act compelling a state court to enforce it in an equity suit, brought by private citizens, in which an injunction had been granted under the state anti-trust act, and in which the plaintiffs claimed precisely the same rights under the state act and the Federal act.

If the state court is assumed to have so decided, the decision was so plainly right that a contention to the contrary is frivolous.

2.—If the state court is assumed to have held that the defendants' combination was not unlawful under the Federal anti-monopoly act, that decision, on the facts found, was plainly right.

There was no finding of fact or law that the combination restrained inter-state commerce.

The American Publishers' Association had no capital; it did not own, buy, sell, rent, possess, manufacture, produce, transport or deal in property or commodities of any kind or render any service to the public, like the transmission of mes-

sages. It did not own copyrights or have any interest in them. It did not publish books. It did not limit output. It did not transact business or undertake to keep strangers out of business. All publishers were admitted to membership on equal terms. Every member was free to deal, under the rules, with all booksellers or other persons. The association did not fix or have the power to fix any price of any book. Each member was free to fix the price of every book published by him. There was no restriction of competition between publishers, and there was no restriction of competition between wholesale dealers or jobbers.

The only restriction upon competition contemplated by the agreement was that each retail dealer would be forbidden by his contract with each copyright owner to compete with other retail dealers in regard to the retail price fixed by such copyright owner upon copyrighted books published by him for one year after publication.

It is the contention of the defendants that these facts distinguished their agreement from the combinations condemned by this Court in *United States v. Trans-Missouri Freight Association*, 166 U. S., 290; *United States v. Court Traffic Association*, 171 U. S., 505; *Addyston Pipe & Steel Co. v. United States*, 175 U. S., 211; *Montague & Co. v. Lorry*, 193 U. S., 38; *Northern Securities Co. v. United States*, 193 U. S., 197; *Swift & Co. v. United States*, 196 U. S., 375; *Harriman v. Northern Securities Co.*, 197 U. S., 244; *Standard Oil Co. v. United States*, 221 U. S., 1; and *United States v. American Tobacco Co.*, 221 U. S., 106.

It is the contention of the defendants that their agreement was lawful under the authority of *Anderson v. United States*, 171 U. S., 604; and *Hopkins v. United States*, 171 U. S., 578, because it

was made for the *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public; that their rules provided for just and fair dealing among them; that the restraint upon interstate commerce, if any, is not direct nor intended, but accidental and remote; that the association has attempted no monopoly, but was simply a means by which the individual members of the association have been the better enabled to transact their business as publishers of copyrighted books and to maintain and uphold a proper way of doing it.

The defendants contend that the agreement was not unreasonably restrictive of competitive conditions and that it was entered into with the legitimate purpose of reasonably forwarding personal interest and developing trade, and did not restrain the free flow of commerce or bring about the enhancement of prices.

The object sought, namely, that each copyrighted book for one year after publication, whatever the retail price might be, should be sold to every purchaser at that price, without discount or rebate, is not in itself unlawful, but is in accord with the principle of equality enforced by modern legislation upon common carriers and public corporations.

It is alleged in the complaint that ninety-five per cent. of the publishers were members of the American Publishers' Association and that ninety per cent. of the booksellers supported it. No publisher or bookseller opposed it. This, in the absence of proof that the public was injured by increase of prices, is strong, if not conclusive, evidence of the reasonableness of the agreement. When rules for dealing in copyrighted books exclude no one from the book

trade and are approved by all engaged in the book trade, they must be suitable to develop trade and facilitate the free flow of commerce. It is the trade and commerce so conducted which are to be protected from restraint.

Macy & Company are not, properly speaking, booksellers. They are proprietors of a department store who, incidentally, deal in books. Their dealings in recently published copyrighted books are both monopolistic and fraudulent.

To meet competition, Macy & Company sell new copyrighted books at retail for less than the price paid by them and less than the lowest wholesale price at which said books are sold, and they advertise these sales. (Record, p. 134.)

This shows "an attempt and purpose to suppress a competitor by underselling him at a price so unprofitable as to drive him out of business," which in a message sent by the President to Congress, on December 5, 1911, was described as a badge of the unlawful purpose denounced in the anti-trust law (and see the opinion of Bartlett, *J.*, 177 N. Y., 492).

The dealings of Macy & Co., with new copyrighted books, are also fraudulent. They sell current copyrighted magazines and new copyrighted books at retail for less than the lowest wholesale cost price and then advertise that "on other lines—the ones more difficult for inexperienced people to judge of qualities—the price differences in our favor are much greater" . . . and on another day "How about books? We use them to illustrate because you know books. They silence criticism. Our rates range from 10 cents to \$1.50 less than others ask for the same books. We save you much more on other lines" . . . and again "Books are used merely as a peg on which to hang a general story" . . . the average

is about fifteen per cent. in our favor on books. Of course, other lines show a much greater difference—our prices ranging down to one-half less than elsewhere. However, books are excellent guages—they are unmistakably alike and are, therefore, easily susceptible of comparison. That is our reason why we submit them for your judgment" (pp. 134, 135). The prosperity of the plaintiffs' business proves the falsity of these advertisements.

Thus, Macy & Company use copyrighted books as an instrument of fraud just as the "green goods" dealer uses the dollar bill which he sells for fifty cents.

Is that a trade which it is unlawful for the injured publishers to restrain?

Publishers of copyrighted books are not bound to permit Macy & Company to use them merely as a peg on which to hang a story—especially when that story is false, and is intended to deceive the public and to drive booksellers out of business—and when such use injures the market value of the copyrighted book and restrains the sale of it through other channels.

If a publisher should deal with his own magazines and books as Macy & Company deal with them, it would be "a badge of unlawful purpose" and of monopoly. Macy & Company produce nothing, but they suppress their competitors, who are the publishers' customers, by selling below cost the publishers' wares.

No extended argument is permissible upon this motion, but we submit that the record is so barren of facts showing that the defendants monopolized or unduly restrained interstate commerce, that a refusal to hold this agreement unlawful under the Federal anti-trust act would have been plainly right.

Omission to find such facts can not be supplied by this court. *Bement v. National Harrow Co.*, 186 U. S., 70, 83.

3.—The contention that the Federal anti-trust act prohibits a contract between the owner of a copyright and his vendee, fixing the future price of a copyrighted book, is arguable and the argument upon it ought not to be presented upon this motion.

It has been held by the N. Y. Court of Appeals that such a contract, so far as the New York anti-trust statute was concerned, was valid under *Bement v. National Harrow Co.*, 186 U. S., 70. That case sustained a contract by a patentee with his licensee as against the Federal anti-trust act.

Whether the Court of Appeals was right in applying the principle of the *Bement* case to a contract concerning copyrighted books is not, as has been shown, here in question, for the error, if any there was, consisted in sustaining as against a state statute a claim made under a Federal statute—in overestimating a Federal privilege or immunity.

How far the sole liberty of vending a copyrighted book is analogous to the sole right to vend a patented article has not been decided by this court, and the question whether a contract between a copyright owner and his licensee to fix prices may be lawful under the rule in the *Bement* case is here an open one.

This question was not decided in *Bobbs-Merrill Co. v. Straus* because there was no claim in that case of contract limitation nor license agreement controlling the subsequent sales of the book. This fact was important, as is shown by the repeated mention of it by the court. *Bobbs-Merrill Co. v.*

Straus, 210 U. S., 339, 342, 343, 346, 350; *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S., 373, 405, and the distinction was duly recognized in the case at bar by the Court of Appeals, speaking by Judge Gray. *Straus v. American Publishers' Association*, 193 N. Y., 496, 498.

Reserving the right to argue this case on the merits if that should be necessary, we respectfully submit the motion to dismiss or affirm without further discussion.

STEPHEN H. OLIN,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. ~~4000~~ **1721** U. S. Supreme Court, D. C.
FILED

FEB 17 1912

JAMES H. McKENNEY,
CLERK

ISIDOR STRAUS and NATHAN STRAUS,
the firm of R. H. Macy & Company,

Plaintiffs in Error,

vs.

AMERICAN PUBLISHERS ASSOCIATION, et al.

**In Error to the Supreme Court of the State of
New York.**

**POINTS IN OPPOSITION TO MOTION TO DISMISS WRIT OF
ERROR OR AFFIRM JUDGMENT.**

**WALLACE MAC FARLAND,
EDMOND E. WISE,**
Of Counsel, in opposition to motion.

Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 439.

ISIDOR STRAUS and NATHAN
STRAUS, composing the firm of
R. H. MACY & Co.,
Plaintiffs-in-Error,

against

AMERICAN PUBLISHERS' ASSOCIA-
TION, *et al.*,
Defendants-in-Error.

**In Error to the Supreme Court of
the State of New York.**

**Brief for Plaintiffs-in-Error in Op-
position to Motion to Dismiss or Af-
firm.**

Facts.

The plaintiffs brought this action in the Supreme Court of the State of New York not under any statute, but in equity under the general law of the State, to restrain an unlawful combination and conspiracy against them by defendants, by which the plaintiffs had been greatly damaged, and also to recover the damages sustained.

To appreciate the scope of the complaint it must, of course, be read as a whole. The plaintiffs allege that the defendants have combined and associated themselves together to do unlawful acts, that is to say, to prevent competition in the sale of books, both copyrighted and uncopyrighted, and to establish and maintain the prices of all books published by them, or any of them, and to destroy the trade in books of all dealers who will not maintain the prices established by the defendant combinations (Complaint, pars. 15th to 18th, pp. 17-20).

To show the unlawful purposes of the defendant combinations, that is, the unlawful acts for the performance of which the combinations were made, the plaintiffs allege that they were formed and carried out in violation of certain statutes which declare combinations for such purposes, carried out by such methods, unlawful and even criminal:

(1) Certain laws of the State of New York, afterwards more particularly defined in the proceedings as the State Anti-Trust Act (Chap. 699, Laws 1899), now General Business Law, Sections 340-346,—

(2) The Federal Anti-Trust Act of July 2, 1890.

The application of the Federal Anti-Trust Act to the action is quite clearly indicated in the complaint. The defendant, the American Publishers' Association, is alleged to be—

“a membership corporation, whose places of business are situated and conducted throughout a number of the States of the United States as well as New York, comprising about ninety-five per cent., both in number and extent, of

the business of the publishers of all kinds of books * * * throughout the different States of the United States." (Complaint, par. Second, p. 11.)

The defendant, the American Booksellers' Association, is alleged to include 90 per cent. of the wholesale and retail booksellers throughout all the States of the United States (Complaint, par. Fourth pp. 13-14).

The individual defendants are officers or members of these associations (Complaint, fol. 38, p. 13).

These interstate associations of publishers and booksellers, it is alleged, have entered into a combination to restrict competition in the supply and price of books published by them, both copyrighted and uncopyrighted (Complaint, pars. 15th-18th, pp. 17-20), and ~~that they~~ have, in violation of the statutes aforesaid, restrained and prevented competition in the supply and prices of books throughout all the States of the United States (Complaint, par. 19th, p. 20). The violently unlawful methods pursued to carry out the unlawful purposes of the combination are fully alleged.

The complaint, therefore, we submit, though its allegations in respect to the operation of the defendant combinations upon interstate commerce might have been more specific, quite obviously shows the interstate character of the defendants; that they were engaged in business throughout and between the different States of the United States, and that their combination was intended to restrain, and even destroy, competition in the supply and prices of books, not only in the State of New York, but also throughout and between the different States of the United States.

It is not necessary, however, that the federal question upon which a plaintiff-in-error relies to

maintain the jurisdiction of this court to review the final judgment of the state court, should be defined with entire precision in the complaint. If the federal right relied upon has been fairly and specifically asserted in the Trial Court and presented to it and the Appellate Courts for decision, that will be sufficient, assuming that the other conditions of the right of review are fulfilled. We are dealing here simply with the point of the sufficiency of the assertion of the claim. Any lack of specification in the complaint is fully cured by the findings of fact of the Trial Court and the propositions of law based thereon presented by the plaintiff-in-error and decided adversely to them, both by the Trial Court and by the Appellate Courts.

The decision of the Trial Court begins at page 115 of the record. The interstate character of defendants' business; the intent of the combination to restrain interstate commerce, and the unreasonable restraint actually exercised, are fully found (Decision, p. 115; findings of fact, 5, 8, 12, 13, 14, 19, 25, 28-38, 42, 55, 57, 67, 90, and especially 76, 77, 78). These findings of fact are all repeated and found in plaintiffs' proposed findings presented to the Trial Court, beginning at page 145.

Findings 76, 77 and 78 are as follows:

"76. That the members of the said two associations resided in and carried on their business of selling books in many different States of the United States, and were engaged in the business of purchasing books, copyrighted and uncopyrighted; from each other and from other persons in many States other than the State in which the purchaser resided and did business."

"77. That the rules, regulations and agreements of the said two associations and their respective members were applied and enforced from the first day of May, 1901, as from time

to time amended, against all publishers and dealers in books throughout the different States of the United States, whether such publishers and dealers were or were not members of either of such associations and whether they purchased books in one State for transportation and delivery in another, or for delivery in the State where purchased."

"78. That the members of the said two associations have heretofore purchased, distributed and sold since the first day of May, 1901, and still purchase, distribute and sell, at wholesale and retail, the large majority of all copyrighted and of all uncopyrighted books dealt in throughout the various States and Territories of the United States."

These three findings, which deal specifically with the facts proved as affecting interstate commerce, must, of course, be read with the other findings cited, which, by 76, 77 and 78, are found by the Court to apply to interstate trade in copyrighted books.

From these findings of fact the plaintiffs' propositions of law V, VII and IX (pp. 162-163) necessarily follow, though the Trial Court refused them and the plaintiff excepted (pp. 167-169). The refusal of the Trial Court to find these conclusions of law, which were fully supported by the findings of fact above referred to, was due, of course, to the first decision of the Court of Appeals (177 N. Y., 473), which restricted the plaintiffs' right of recovery to uncopyrighted books, as hereafter explained. These propositions V, VII and IX are as follows:

"V. That the agreements, resolutions or combinations set forth in the complaint affected Interstate commerce and were unlawful, illegal and contrary to the statutes of the United States and more particularly of the statute passed on the 2nd day of July, 1890, known as An Act to Protect Trade and Commerce

Against Unlawful Restraints and Monopolies, and set forth in full at page 762 of Volume I of Supplement to the Revised Statutes of the United States."

"VII. That such resolutions and agreements purporting to restrict the effect of the combination, arrangement or contracts to copyrighted books likewise affect an article of interstate commerce and were unlawful and contrary to the aforementioned statute of the United States as being in restraint of interstate commerce and tending to create a monopoly."

"IX. That the owners of several separate copyrights are not empowered to enter into any contract or agreement or combination between themselves concerning the supply and price of books published under their separate copyrights which would be unlawful and contrary to the statutes of the United States against combinations in restraint of trade or for the purpose of creating a monopoly, if entered into with reference to the supply or price of uncopyrighted books."

The sufficiency of these propositions to raise a federal question in this court seems to be conceded by defendants (see their brief on this motion, p. 16), though they argue that for the reasons there stated the plaintiffs-in-error cannot avail themselves of the question thus raised.

The first decision of the Court of Appeals in this action (177 N. Y., 473) was rendered on an appeal from the order of the Appellate Division reversing an interlocutory judgment of the Special Term sustaining defendants' demurrers to the complaint.

Plaintiffs' demand for equitable relief from, and damages suffered through, the unlawful combination of the defendants related both to the unlawful restrictions of, and injuries to, plaintiffs' trade in *uncopyrighted* books as well as in *copyrighted*

books. The Court of Appeals in this decision held that the combination was a violation of the state anti-trust act (quoted in the defendants' brief on this motion, p. 6), and, therefore, illegal as to *uncopyrighted* books; but that so far as the defendant combinations were directed to maintaining a combined monopoly in copyrighted books, the federal laws made such monopolies by owners of copyrights legal, and being of paramount authority on the subject of copyright, no relief at all could be granted to the plaintiffs in respect to copyrighted books on any grounds alleged in the complaint.

The question presented to the Court of Appeals on the appeal reported in 177 N. Y. was whether the complaint stated a cause of action, and the court decided that it did, and overruled the demurrers, giving the defendants time to answer, of which privilege they availed themselves after they had amended their unlawful combination agreement so as to make it conform to their interpretation of the opinion of the court. These amended answers set up, among other matters, as separate defences, that as owners of copyright privileges granted by the United States they were "*acting in all respects in accordance with the laws of the State of New York and of the United States of America*" (Record, p. 39, fol. 115). Plaintiffs demurred to this and other defenses, but when these demurrers were overruled they were withdrawn, and upon the issues so presented, the case was tried at Special Term.

The Special Term rendered its decision on November 19, 1907 (pp. 113-138), and an interlocutory judgment entered thereon ordered a reference to assess such damages as the plaintiffs might prove in respect to "*uncopyrighted books*" (pp. 139-142).

The Special Term was, of course, controlled by the decision of the Court of Appeals on the demurrers (177 N. Y., 473), and, therefore, in its in-

terlocutory judgment rigorously excluded all relief in respect to copyrighted books; but found in its decision and in plaintiffs' proposed findings all the facts necessary to entitle the plaintiffs-in-error to relief in respect to *copyrighted* books, if at any future period in the litigation the decision of the Court of Appeals in respect to the proper construction of the federal copyright laws should be held to be erroneous. The plaintiffs-in-error appealed to the Appellate Division of the Supreme Court from this interlocutory judgment before going to the referee for an assessment of damages in respect to *uncopyrighted* books only. Before their appeal was heard, this court had decided the case of *Bobbs-Merrill Co. v. Straus* (210 U. S., 339), and indeed it was in hope of this decision that the appeal of the plaintiffs-in-error to the Appellate Division was taken. The Appellate Division and the Court of Appeals had denied relief to the plaintiffs in respect to copyrighted books solely by reason of the construction those courts placed upon the copyright laws, namely, that the effect of certain of their provisions, especially U. S. R. S., 4952, was to confer upon the owners of copyrights, either singly or in combination, the right to determine the prices at which the purchaser of copyrighted books from the immediate vendee of the owner of the copyrights, and subsequent purchasers from that purchaser *ad infinitum*, should sell such books, and to blacklist any bookseller in the United States who would not maintain their prices, and to ruin and destroy his business by the methods alleged in the complaint, proved on the trial and found by the Trial Court in its decision. The plaintiffs not unreasonably supposed that when by its decision in *Bobbs-Merrill Co. v. Straus* this court had authoritatively determined that the copyright laws of the United States did not authorize such an astounding

result, the Appellate Division and the Court of Appeals would be quick to recognize their error, and while the case was still before them for consideration and open to any judicial action, they might determine to be proper, would grant to the plaintiffs the relief for which they prayed in respect to *copyrighted* books also. The Appellate Division, however, by a majority vote, affirmed the interlocutory judgment in these words:—"Judgment affirmed, with costs, on the authority of 177 N. Y., 473" (127 App. Div., 935). Justices Ingraham and McLaughlin dissented, stating in their opinions that the whole foundation of the previous decision of the Appellate Division (85 App. Div., 460) and of the Court of Appeals (177 N. Y., 473) in respect to copyrighted books, had been completely overthrown by the decision of *Robbs-Merrill v. Straus*, and that the opinion of this court on such a subject, on which its authority is controlling, should be respected and applied to the case in hand.

It is sufficiently obvious that the decision of the Appellate Division as a court, was based on the reasonable ground that as the Court of Appeals also had maintained this erroneous view of the effect of the federal copyright laws, a proper respect for the decision of the superior tribunal required the Appellate Division to leave it to the Court of Appeals to change its former opinion. The Appellate Division, thereupon, as plaintiffs could not as of right appeal from its order affirming an interlocutory judgment, gave plaintiffs permission to appeal to the Court of Appeals, and certified to that court the question at issue. The Court of Appeals, when the question certified from the Appellate Division was presented to it and argument made as to the effect of the decision of this court in the *Robbs-Merrill* case upon the previous decision of the Court of Appeals, refused, by a divided court, to change its

former decision, declaring in effect that even if the decision of this court in the Bobbs-Merrill case showed that the views previously expressed by the Court of Appeals (177 N. Y., 473) were erroneous in respect to the construction of the federal copyright statutes—and this the Court of Appeals did not admit—still the decision in 177 N. Y., 473 was the law of this case, and the court would not change it. Judge Bartlett, writing for the three dissenters out of the seven Judges who composed the court, took the position that the decision in the Bobbs-Merrill case was wholly irreconcilable with the former decision of the Court of Appeals (177 N. Y., 473) in respect to copyrighted books, and that as the federal laws are paramount on this subject, and the Supreme Court of the United States is the final arbiter of questions arising under those laws, its decision should be respected and applied (193 N. Y., 502). The Court of Appeals, therefore, by a divided vote, affirmed the order of the Appellate Division which had affirmed the interlocutory judgment restricting plaintiffs' relief to damages for *uncopyrighted* books only, and remanded the case. The plaintiffs then proceeded to carry out the interlocutory judgment of the Special Term, proved their damages as to uncopyrighted books before the referee, and on the coming in of the referee's report, the final judgment of the Special Term was entered (pp. 198-201). From this final judgment of the Special Term the plaintiffs appealed directly to the Court of Appeals, according to the New York procedure (Code of C. P., sec. 1336) requesting the review of so much of the judgment of the Special Term as failed or refused to grant injunctive relief and award damages suffered by the plaintiffs in the purchase or sale of "*copyrighted*" books, etc. (p. 5, fol. 13) and brought up for review so much of the interlocutory judg-

ment as failed or refused to adjudge that the plaintiffs were entitled to injunctive relief and to recover damages in respect to "copyrighted" books, etc. (pp. 5 and 6, fols. 15-17). The Court of Appeals, without further opinion, affirmed the judgment of the Special Term (199 N. Y., 548).

Before proceeding to discuss the legal questions involved, we repeat that it should be borne in mind that the plaintiffs' appeal from the final judgment of the Trial Court to the Court of Appeals of the State of New York dealt only with the denial of relief in respect to *copyrighted* books, and that the judgment of the Court of Appeals which the plaintiffs-in-error seek to review in this court relates only to copyrighted books.

POINTS.**I.**

The plaintiffs-in-error specially set up and asserted in the Trial Court, and presented to that Court and to the Appellate Courts for consideration and decision in support of this action, that the Federal Anti-Trust Act declared illegal combinations of owners of copyrights to restrain competition in the supply and price of copyrighted books in Interstate Commerce. The judgment of the Court of Appeals decided against this claim.

This federal right so distinctly asserted would, if decided in favor of plaintiffs-in-error, have necessarily required a contrary judgment from the State Court.

(A) The allegations of the complaint, and the findings of fact actually made by the Trial Court showing the interstate character of the defendant combination, their unlawful intent to restrain and destroy interstate commerce in copyrighted books, and their unreasonable and unlawful methods in carrying out their conspiracy against the plaintiffs-in-error, have been fully indicated in the statement prefacing this brief (*supra*, pp. 2-6). The refusal of the Special Term (*i. e.*, the Trial Court) to find the legal propositions which plaintiffs claimed should follow from the facts found (plaintiffs' proposed conclusions of law V, VII and IX (pp. 162-164) and plaintiffs' exceptions to these refusals

(pp. 167-169) have also been indicated (*supra*, pp. 5-6).

(B) 1.—The Court of Appeals by its judgment, for the reasons expressed in its several opinions, has denied to the plaintiffs-in-error any relief whatever in respect to copyrighted books, with which alone this appeal deals. The plaintiffs, it cannot be questioned, asserted the unlawful character of the defendant association not only under the state statute, but also under the federal anti-trust act of July 2, 1890 (complaint, pp. 2-3, *supra*). The total denial by the state courts of relief in respect to copyrighted books necessarily decided against the plaintiffs the claim asserted under the federal statute as well as that asserted under the state statute. It is wholly immaterial, as again and again decided by this court, that the state courts in their opinions make no reference to the right asserted by the plaintiffs-in-error under the federal anti-trust act if the decision necessarily denies it (*infra* this brief, pp. 15-16).

Whether the claim asserted by the plaintiffs under the federal anti-trust act in support of this action be untenable or not (we are not dealing with that question now), the decision of the state court denying relief in *toto* in respect to copyrighted books necessarily denies the plaintiffs' claim to relief based on the assertion that the federal anti-trust act declared illegal such monopolistic combinations of owners of copyrights as defendants were proved to be.

The defendants specially set up in their answers as a defense in justification of their monopolistic combinations that they were legal by the copyright laws of the United States, and that with respect to all the matters alleged in the complaint they were acting in all respects in accordance with the laws of the State of New York and of the United States of America (Rec., p. 39, fol. 116).

To such a defense, under the system of pleading authorized by the New York Code of Civil Procedure, the plaintiffs cannot reply as of right. The plaintiff can reply only to counterclaims set up in the answer. To a defense, or plea in bar like this, the ~~defendant~~^{plaintiff} can reply only by an order of the court obtained on the defendant's motion. The plaintiffs-in-error, therefore, in alleging in their complaint that the defendant associations,—being interstate combinations of owners of copyrights, including over 90 per cent. of all the publishers and booksellers throughout the United States engaged in interstate business in copyrighted books, were unlawful combinations under the federal anti-trust act,—were anticipating this defense based on the copyright statutes by avoiding it and asserting a superior federal right in support of their own action. They alleged, in effect, that the defendant associations were formed to restrain unlawfully interstate commerce in copyrighted books, and by the Act of Congress of July 2, 1890, were unlawful combinations, anything in the copyright laws of the United States to the contrary notwithstanding.

On the trial the plaintiffs fully established by their proofs, and the Trial Court found as facts in distinct propositions, everything required to establish the claim of plaintiffs-in-error, that the defendants were engaged in interstate commerce, and that their combinations were formed to restrain unduly and unreasonably interstate trade in copyrighted books, and even to destroy competition in the supply and prices of such books in interstate commerce (*supra*, pp. 4-6), but refused to find that such combinations were unlawful under the federal anti-trust act or any state statute, and the Court of Appeals affirmed this judgment. This, of course, was a direct denial of the federal right specially

set up and claimed by the plaintiffs-in-error, and concisely expressed in the heading to this point.

2.—Necessarily, a contrary decision by the Court of Appeals would have required a contrary judgment. Its judgment was that combinations by owners of copyrights in restraint of interstate commerce in copyrighted books were lawful. If now the Court of Appeals had decided that these combinations of owners of copyrights, found by the Trial Court as a matter of fact to be engaged in the unreasonable restraint of interstate commerce in copyrighted books were, therefore, operating in violation of the federal anti-trust act of July 2, 1890, as claimed by the plaintiffs-in-error,—in other words, that that act made unlawful even combinations of owners of copyrights in other respects obnoxious to its terms, the whole foundation of the court's decision,—that the plaintiffs-in-error could not have relief against monopolies of owners of copyrights, because such monopolies were lawful,—would have been overthrown, and the plaintiffs-in-error would have obtained the relief in respect to copyrighted books for which they prayed.

(C) It is quite immaterial that the Court of Appeals in its several opinions does not expressly overrule plaintiffs' claim under the federal anti-trust act of July 2, 1890, or refer to that act, if by necessary implication its decision denies the asserted right of the plaintiffs-in-error.

In *Decey v. Des Moines*, 173 U. S., 193, the court at page 199 says:

“Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the

court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law (*Roby v. Colehour*, 146 U. S., 153, 159; *Chicago, Burlington, &c., Railroad v. Chicago*, 166 U. S., 226, 231; *Green Bay, &c., Company v. Patten Paper Company*; and *Bank of Lincoln v. Bank of Cadiz, supra*)."

In *C. B. & Q. R. R. v. Drainage Commissioners*, 200 U. S., 561, page 580, the Court says:

"* * * But it is equally well settled that the failure of the state court to pass on the federal right or immunity specially set up, of record, is not conclusive, but this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law."

Also:

West Chicago R. R. v. Chicago, 201 U. S., 506, 519-520.

Green Bay Co. v. Patten, 152 U. S., 58, 68.

Harding v. Illinois, 196 U. S., 78.

(D) 1—The argument of defendants-in-error in support of this motion, that the plaintiffs in error cannot avail themselves of the denial of any rights asserted by them under the federal anti-trust act, because in the complaint they allege that the defendant associations were unlawful under both state and federal acts, is wholly unsound. With extreme technicality they argue that this means—in the complaint at least—an assertion of a single right resting partially upon state law and partially

upon federal law. The defendants appear to admit in their brief on this motion (Point III, p. 16) that were it not for this combination of both the state and federal statutes in the complaint, the plaintiffs' proposed conclusions of law V, VII and IX, already set forth, would have been sufficient to raise the federal questions on which the plaintiffs-in-error relied and which are asserted in their assignments of error.

So far as the complaint is concerned, even if there were any defect in the assertion of the claim, it would be immaterial, because in the Trial Court, as shown by plaintiffs' findings of fact and proposed conclusions of law (pp. 144-164), upon which the Trial Court ruled, the plaintiffs' rights under the federal act were separately and distinctly asserted.

The conclusions of law presented by plaintiffs called to the Court's attention and presented for decision, first, that the agreements as they existed from May, 1901, to April, 1904, were unlawful, both as to copyrighted and uncopyrighted books under the state law (I-IV, p. 161), and also under the federal anti-trust laws (p. 162, Conclusion V); secondly, that such agreements, as amended in April, 1904, were unlawful under the state law (Conclusion VI) and also under the federal statute (Conclusion VII). And in Conclusion IX the question is fairly presented that owners of copyrights cannot enter into agreements which would be contrary to the federal anti-trust law if they covered uncopyrighted books. Two classes of merchandise, two separate and distinct agreements, and two periods of time, were before the court for consideration, as well as the application of two separate statutes. The contracts of 1901-1904 covering copyrighted as well as uncopyrighted books were declared offensive to the state statute so far as uncopyrighted books were concerned. The combination of 1904,

which affected only copyrighted books, was declared lawful both under the state and the United States anti-trust laws. After the decision of the Court of Appeals sustaining the right of owners of copyrights to combine, the plaintiffs had a perfect right to and did in fact present to the court the alternative propositions that if such combination is legal under the state law, it is wholly illegal under the federal law, and the state court's denial thereof, necessarily implied from its decision, constitutes a denial of plaintiffs' right under the federal statute which can and ought to be reviewed by this Court.

The plaintiffs-in-error were certainly entitled to assert as many statutory rights in support of their action as they could. The point that the defendants-in-error seem to overlook is that the state court denied *wholly* the plaintiffs' claims in respect to copyrighted books. The state court may be considered as deciding, first, that in view of the copyright laws of the United States the plaintiff cannot successfully assert the illegality of the defendant associations in respect to copyrighted books under the state anti-trust law. Assume that that is not a federal question available to plaintiffs-in-error. If the decision had been that the defendant combinations were unlawful under the local law, the federal right alleged would have been immaterial; but the court having denied plaintiffs' claim under the local law was then bound to go further and inquire whether the second claim asserted by the plaintiffs in avoidance of the defense under the copyright laws, namely, that under the federal anti-trust act such combinations of owners of copyrights engaged in restraining competition in interstate commerce were, under the facts found by the Trial Court, illegal, was well founded (*C. B. & Q. Ry. Co. v. Drainage Commrs.*, 200 U. S., 561, 580-581). Had the Court of Appeals so determined, necessarily it must

have decided that the copyright laws afforded no defense to the defendant associations, and having *wholly* denied relief to the plaintiffs-in-error in respect to copyrighted books, it necessarily denied the validity of the right asserted under the federal anti-trust act. If a litigant asserts in support of his claim ten points, nine of which are bad and one good, and relief is wholly denied, the one good point is necessarily overruled as well as the nine bad points.

If the Court of Appeals had decided that the combinations were unlawful as well in respect to copyrighted books as in respect to uncopyrighted books, without indicating whether this illegality depended on the state statute alone or the federal statute alone, or on both, it would, of course, have been impracticable to say that it had either affirmed or denied the federal right asserted by the plaintiffs under the federal anti-trust act, though, of course, it would in that event have been quite immaterial to the plaintiffs as they would have received the relief for which they prayed. We think the defendants have failed to note that while a recognition of a right based upon two statutes does not necessarily involve a decision that the right is valid under both statutes, a decision denying that right entirely necessarily involves a ruling that the right does not exist under either statute.

2.—The defendants' arguments on this alleged combination of an asserted federal right "inextricably blended" with a non-federal right, are needlessly confused. The federal right asserted by the ~~defendants~~^{plaintiffs} is perfectly distinct even in the complaint, but, if open to any criticism there, is set up with entire precision in the findings presented to the Trial Court. But the defendants' brief is open to the criticism of still greater confusion in what

is there said in respect to the effect of plaintiffs' assertion of a non-federal right.

The well-settled rule of this Court, nowhere distinctly stated in the defendants' brief on this motion, because if distinctly stated it would have destroyed most of the argument on this point, is:

"that where the judgment of the state court rests upon an independent separate ground of local or general law, *broad enough or sufficient in itself* to cover the essential issues and control the rights of the parties, however the federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question." (*C. B. & Q. R. R. v. Drainage Commrs.*, 200 U. S., 561, p. 580.)

The plaintiffs submit that the preceding argument shows that the decision by the state court of the non-federal question involved in this case, to wit, the application of the state anti-trust act to the plaintiffs' claim for relief in respect to copyrighted books, was not *sufficient* to dispose of the case, but when that question was decided against the plaintiffs on the state court's erroneous construction of the copyright laws, it was bound to go further and consider whether the plaintiffs' asserted right under the federal anti-trust act against this effect of the copyright laws did not destroy the defense asserted under those laws and entitle the plaintiff to relief in respect to copyrighted books.

II.

It is no answer to the foregoing argument to allege that the State Courts cannot enforce the Federal Anti-Trust Act of July 2, 1890, and, therefore, could not have considered it in deciding this case against the plaintiffs-in-error.

The plaintiffs-in-error do not sue on any statute, state or federal, nor do they ask any remedy under either statute.

The plaintiffs-in-error brought their action under the general law for injunctive relief, and damages inflicted upon them by the unlawful combination of the defendants to destroy the plaintiffs' book business. A combination of individuals or corporations becomes an unlawful conspiracy if formed to do unlawful acts, or to achieve its otherwise lawful purposes by unlawful means. The plaintiffs allege that the defendant combinations were formed to do unlawful acts and to use also unlawful means.

To show the unlawful purpose for which the defendant associations were formed, and thus to stamp them as illegal, the plaintiff alleged that they were in violation,

(1) Of the state statute.

(2) Of the federal statute. To make the federal act applicable undoubtedly the ^{plaintiffs} ~~defendants~~ were bound to allege, or at some proper time show in the Trial Court, that the defendant associations were engaged in interstate commerce, and that their agreement to restrict competition in copyrighted books unlawfully restrained interstate com-

merce in such books. We submit that we have already shown that this was fully done. (Findings cited, *supra*, pp. 4-6).

The state anti-trust act (General Business Law sections 340-346) gives no remedy to individual plaintiffs expressly. It stamps agreements in violation of that act as misdemeanors, and authorizes the attorney-general of the state to take proceedings to suppress them. But an action at common law or in equity, as the case may require, under the general law of the state, charging a violation of the state statute for the purpose of showing the illegality of the combination, can, of course, be maintained,

Rourke v. Elk Drug Co., 75 App. Div., 145;

Foster v. Retail Clerks' Ass'n, 39 Misc., 48, 58;

Ducher Watch Co. v. Howard, 3 Misc., 582;

Park & Son v. Natl. Drug Assn., 175 N. Y., 1, 38.

So undoubtedly under the federal act. This is sufficiently illustrated by the case of *Bement v. Harrow Co.*, 186 U. S., 71. In this case the federal anti-trust act was used as a defense to an action in a state court on a contract, the defendant setting up that the contract was void under the federal anti-trust act of July 2, 1890.

The only federal question raised was whether the contract was in violation of that act. The defendant-in-error took the point in this court that there was no federal question involved, because the federal anti-trust act allowed no private individual to avail himself of its provisions except by means of the action allowed in section 7 for treble damages,

which could be brought only in the federal courts. To this the court replied (pp. 87-88) that assuming the defendant-in-error's position in respect to suits under the anti-trust act to be correct, that statute was perfectly available as a defense to any defendant sued in a state court on a contract in violation of that act.

The court said, p. 88:

"The first section of the act provides that 'every contract, combination in the form of a trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.' Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defense, and we think when proved it is a valid defense, to any claim made under a contract thus denounced as illegal."

Now, the use made of the anti-trust act in the Bement case is quite analogous to the use made here by the plaintiff of the same federal statute. Having proved that the defendant combinations were engaged in interstate commerce and that their operations to restrict competition in copyrighted books unreasonably restricted such competition in

interstate commerce, and having had those facts found by the Trial Court, the plaintiffs-in-error assert against the defense under the copyright laws,—“whatever monopolies may be conferred upon copyright owners by those statutes, this general and later federal statute declares that all combinations in restraint of interstate commerce, including combinations of owners of copyrights, are illegal, and, therefore, by virtue of that statute we assert in support of our action under the general law that the defendant associations are illegal combinations.” Obviously, in asserting this right, the plaintiffs-in-error did not ask the state courts to take jurisdiction of any suit under the federal anti-trust act.

The plaintiffs' position here discussed is in principle quite similar to that of the plaintiff in the well known case of *McCormick v. Market Bank*, 165 U. S., 538. In that case the plaintiff sued on a lease of premises to the defendant to be occupied as a banking office, which had been made and delivered prior to the complete organization of the defendant as a national bank. U. S. R. S. 5136 forbids a national bank to “transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking.” The defendant claimed under this statute that the lease was void. The ^{plaintiff} ~~defendant~~ asserted the exception, saying this lease was business “incidental and necessarily preliminary to the organization” of the bank. The state courts having defeated the plaintiff, he sued out a writ of error, and in this court the point was taken that there was no federal question. The federal right asserted, it was argued, had been asserted by the bank and decided in its favor. The plaintiff-in-error replied,—“true, the bank did assert

that right, but I asserted the exception." This court held that the plaintiff did assert a federal right which had necessarily been determined against him by the decision against his claim. The court, considering the question, said (p. 546) :

"The plaintiff, in the courts of the state, and by his assignment of errors, filed with the writ of error sued out from this court, specially set up and claimed a right to recover, so far as concerned the construction of that section of the statute, upon two grounds.

"His first ground was that the execution of the lease by the defendant was 'incidental and necessarily preliminary to its organization,' and therefore within the exception of the last clause of the section in question. As to that ground, the case stands thus: The defendant relied on the prohibition to transact any business until it had been authorized by the Comptroller of the Currency to commence the business of banking. The plaintiff relied on the exception to that prohibition. The decision against the plaintiff, therefore, was a decision against a right claimed by him under a statute of the United States."

It would, of course, be immaterial if the exception in such a case were contained in a separate statute. Here, the defendants assert that though monopolies, they are lawful by virtue of the copyright statutes,—to which the plaintiff replies,—if the copyright statutes authorize any monopolies, the federal anti-trust act excepts therefrom monopolies of owners of copyrights unduly and unreasonably restraining interstate commerce in copyrighted books.

It is quite immaterial for the consideration of the present point, whether this claim is a good one or not. It was a distinct assertion of a federal right, which the state courts must be deemed to

have denied, because, if conceded, it would necessarily overthrow, on the facts found by the Trial Court, the final decision of the Court of Appeals.

III.

Even on the defendants' side, it is obvious that the decision in this case turned on a federal question, and it is argued by the defendants-in-error that the right asserted by them under the copyright laws, though a federal question, is not available to the plaintiffs-in-error in the Supreme Court to sustain jurisdiction, because the federal right which the defendants asserted was decided in their favor. This is unquestionably correct as a statement of the general rule.

In their Tenth proposed conclusion of law (p. 164) the plaintiffs-in-error ask the Trial Court to find the following proposition:

"That the sole owner of a copyright cannot, after publication and after he has parted with the title to the copyrighted book, continue to control the sale of such books by reason of any statutory right granted to him. That such control, if it can be secured at all, must be obtained by contract expressed or implied in the same manner as with uncopyrighted books or any other articles or personal property."

The Trial Court refused this proposition, and of course the decision of the Court of Appeals, by necessary implication, also denies it.

While it is not so clear here, in our opinion, as under the preceding points, that the plaintiffs-in-error assert a federal right, which has been denied in the state court, yet even on this point they appear to be within the rule declared in such cases as,—

Nutt v. Knut, 200 U. S., 12, 19;
EauClaire Natl. Bank v. Jackman, 204 U.
S., 522.

In this proposition they assert affirmatively in support of their action a claim under the copyright laws, which the Court of Appeals has by necessary implication declared invalid, and which, if affirmed by the Court of Appeals, would necessarily have required a contrary judgment.

This is a very different thing from merely complaining that the construction given to the copyright laws by the Court of Appeals in support of the right asserted by the defendant was erroneous. There seems to be no valid reason why the parties to a suit in a state court may not on each side assert affirmatively rights under the same federal statute, though mutually conflicting and involving antagonistic constructions of the statute.

IV.

If the foregoing propositions, or any of them, in opposition to the motion to dismiss, are sound, it is hardly necessary for the plaintiffs-in-error to reply to the Fifth Point of the brief of the defendants-in-error in support of this motion, that the federal question, if any, involved in this case is so frivolous that if the appeal is not dismissed for lack of jurisdiction, the judgment of the state court should be summarily affirmed.

If the plaintiffs have specially asserted and claimed the federal right set forth in the foregoing points, the federal question involved is evidently a serious and important one. This, the defendants-in-error, seem themselves to concede in their brief. At page 27 they say:

"3.—The contention that the federal anti-trust act prohibits a contract between the owner of a copyright and his vendee, fixing the future price of a copyrighted book, is arguable, and the argument upon it ought not to be presented upon this motion."

Without further argument, therefore, on the importance of the federal question involved, the plaintiffs-in-error ask that the motion be denied.

WALLACE MACFARLANE,
EDMOND E. WISE,
Of Counsel, in Opposition to the Motion.

7

U.S. Supreme Court, D.
FILED.

DEC 23 1912

JAMES H. MCKENNA

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 129

ISIDOR STRAUS and NATHAN STRAUS, Com-
posing the Firm of R. H. MACY & Co.,
Plaintiffs in Error,

against

AMERICAN PUBLISHERS' ASSOCIATION,
et al.,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

WALLACE MACFARLANE,
EDMOND E. WISE,
Of Counsel.



INDEX.

	PAGE
I. Statement	1
1. The action, its nature and history.....	1-11
2. The facts	11-28
II. Argument	28
1ST POINT. This Court has jurisdiction.....	28
A. The right of plaintiffs in error under the Sherman anti-trust law was asserted to defeat the defense of the copyright laws set up by defendants	28
B. Findings of facts and conclusions of law requesting a construction of the Federal anti-trust law in favor of plaintiffs in error were presented to the trial Court and passed upon adversely to plaintiffs	29
C. The judgment of the State Court was set up as a bar to an action in the Federal Court to enforce defendant's liability under Section 7 of the Sherman law and was sustained as such	29
2ND POINT. The State Court erred in holding that the agreements and combinations were not illegal and contrary to the Sherman anti-trust law	37
A. The publishers combined to prevent competition in the retail price of copyrighted books and in the supply of <i>all</i> books.....	38
B. The agreements of the association were enforced under penalties of boycott and cut-off lists	41
C. The agreements were entered into by seventy-five per cent. of all publishers and a large majority of all booksellers throughout the United States and affected interstate commerce as well as intrastate trade.....	42
3RD POINT. The State Court erred in deciding that owners of separate copyrights can enter into combinations between themselves concerning the supply and price	

	PAGE
of their several copyrighted books which would be contrary to the Federal anti-trust law if such books were not copyrighted	46
4TH POINT. The State Court erred in deciding that the owner of a copyright can by virtue of the copyright law control the ultimate retail price of copyrighted books after he has parted with the legal title to the same, in violation of the Federal anti-trust law	52
Conclusion	56

INDEX OF AUTHORITIES.

<i>Addyston Pipe & Steel Co. v. United States</i> , 175 U. S., 211	42, 43
<i>American Tobacco Co. v. U. S.</i> , 221 U. S., 106.....	42
<i>Arnot v. Pittston & Elmira Coal Co.</i> , 68 N. Y., 558.....	45
<i>Robbs-Merrill Co. v. Straus</i> , 139 Fed., 155.....	8
<i>Robbs-Merrill Co. v. Straus</i> , 210 U. S., 339.....	9, 10, 53, 54, 55
<i>Broten v. Jacob Pharmacy</i> , 41 S. E. Rep., 553 (Georgia)....	45
<i>Butter v. Trade Council</i> , 53 N. J. Eq., 301.....	45
<i>Bement v. National Harrore Co.</i> , 186 U. S., 70.....	47, 51
<i>Cohen v. Berlin & Jones</i> , 166 N. Y., 392.....	44
<i>Connings v. Union Bluestone Co.</i> , 164 N. Y., 101.....	41
<i>Dr. Miles Medical Co. v. John W. Parks & Sons</i> , 220 U. S., 373	43, 50
<i>Howardson v. Y. & L. Co.</i> , 111 Wis., 445.....	45
<i>Henry v. A. B. Dick Co.</i> , 224 U. S., 1.....	49, 51
<i>Judd v. Harrington</i> , 139 N. Y., 105.....	44
<i>Jacobs, In re</i> , 98 N. Y., 98.....	45
<i>Jackson v. Stanfield</i> , 137 Ind., 592.....	45
<i>Montague v. Lowery</i> , 193 U. S., 38.....	42, 43, 49
<i>Moore v. Bennett</i> (Ill., 1892), 15 L. R. A., 361.....	45
<i>Morris Run Coal Co. v. Bariley Coal Co.</i> , 61 Pa., 173.....	45
<i>Northern Securities Co. v. U. S.</i> , 193 U. S., 197.....	45
<i>Park & Sons v. National Druggist Asso.</i> , 175 N. Y., 1.....	5
<i>People v. Milk Exchange</i> , 145 N. Y., 267.....	44
<i>People v. Sheldon</i> , 139 N. Y., 251.....	45
<i>People v. Gilson</i> , 109 N. Y., 389.....	45
<i>People v. Chicago Live Stock Asso.</i> , 170 Ill., 556.....	45
<i>Richardson v. Guhl</i> , 77 Mich., 632.....	45
<i>Straus v. American Publishers Assoc.</i> , 177 N. Y., 473.....	5, 42

	PAGE
<i>Straus v. American Pub. Asso.</i> (Circuit Court, opinion of LACOMBE, J.)	30
<i>Straus v. American Pub. Asso.</i> (Circuit Court of Appeals, opinion of WARD, J.)	31
<i>Scribner v. Straus</i> , 210 U. S.	9, 53
<i>Seaboard Air Line Ry. Co. v. Duvall</i> , 225 U. S., 477.....	29
<i>Swift & Co. v. U. S.</i> , 196 U. S., 375.....	42
<i>Standard Oil Co. v. U. S.</i> , 221 U. S., 1.....	42
<i>Standard Sanitary Mfg. Co. v. U. S.</i> , decided Nov. 18, 1912, not yet reported	42, 44, 47, 48, 51, 55
<i>State v. Nebraska Distillery Co.</i> , 29 Neb., 200.....	45
<i>United States v. Joint Traffic Asso.</i> , 171 U. S., 505.....	43
<i>United States v. Freight Association</i> , 166 U. S., 290.....	43

Supreme Court of the United States

OCTOBER TERM.

No. 172.

ISIDOR STRAUS and NATHAN
STRAUS, Composing the Firm
of R. H. MACY & Co.,
Plaintiffs in Error,
against

AMERICAN PUBLISHERS ASSOCIA-
TION, ET AL,
Defendants in Error.

Statement.

This is a Writ of Error to review a judgment of the Supreme Court of the State of New York entered upon the remittitur of the Court of Appeals, the highest Court of said State in which a decision in this cause can be had, which affirmed a judgment of the Supreme Court entered on the 20th of May, 1909.

The Action.

This action was commenced on the 3rd day of December, 1902, by R. H. Macy & Company, who conduct a large department store in the City of

New York, against the defendants, the American Publishers Association, a New York corporation, which is composed of publishers of about seventy-five per cent. of all books throughout the United States, and many of its members, and against the American Book Sellers Association, a voluntary unincorporated association composed of a large majority of all the book sellers at wholesale and at retail throughout the United States, and some of its members, to enjoin them from carrying into effect various contracts, combinations or conspiracies which were entered into in May, 1901, for the purpose of maintaining a fixed price at retail for all copyrighted books, and of controlling the supply and sale of all books, whether copyrighted or uncopyrighted.

The complaint, after describing the character of the parties and the usual course of business prior to 1901, alleges (Par. 15, page 17) that during the year 1900 a number of prominent publishers, including the defendants, for the purpose of securing to themselves an unreasonable and extortionate profit, and with the intent to prevent competition in the sale of books, and for the purpose of establishing and maintaining the prices of all books published by them, or any of them, and all books dealt in by them, or any of them, and preventing competition in the sale thereof, unlawfully, illegally and contrary to the public policy and the statutes of the State of New York and of the United States, and more especially of a certain statute of the United States passed July 2, 1890, and more particularly described as "An Act to protect trade and commerce against unlawful restraint and monopolies," combined and associated themselves together, and as a part of their unlawful combination, formed the American Publishers Association, a

membership corporation which included amongst its members a large majority of the publishers of all books in the State of New York and throughout the United States. That as a further portion of such unlawful combination, the American Publishers Association and its various members adopted a Resolution and entered into an agreement, which was intended to prevent the cutting or reducing of prices on copyrighted books published by the members of the association, and the members of the association agreed that all copyrighted books published by any of them, after May 1, 1901, should be published and sold at retail at fixed prices without any discounts (Par. 16). As a further part of such unlawful scheme, it was agreed that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by the members or not, should be sold to those book sellers only who would maintain the retail net price of copyrighted books for one year, and to those jobbers only who would sell books at wholesale to no one known to them to cut the retail price, or whose name would be given to them by the association as one who cut such price; that an office was established for the purpose of carrying out this plan, and that the members agreed to aid in the formation of a book sellers' association which was to co-operate with the American Publishers Association in carrying out their unlawful scheme of maintaining the net retail price. Thereupon the American Book Sellers Association was formed, composed of a large majority of book sellers at wholesale and retail throughout the United States, for the avowed purpose of co-operating with the American Publishers Association in the maintenance of the prices on copyrighted books, and preventing competition in the

sale thereof, and in the supply of all books, whether copyrighted or not. Thereupon these two associations and their respective members did in fact co-operate in carrying out their plans, and after the 1st of May, 1901, maintained a combination whereby competition in the State of New York, as well as throughout the States of the United States in the supply and price of books, had been and was restrained or prevented (Pars. 18 and 19).

Plaintiffs, it is further alleged, were invited to join the combination, but refused, and thereupon the defendants conspired to injure the plaintiffs in their business and sought by threats and intimidation to prevent all persons engaged in publishing, buying or selling books from dealing with the plaintiffs, and by various means interfered with the conduct of plaintiffs' business, and injured the same, and that many dealers and publishers, both belonging to said associations and others, refused to sell books at any price to the plaintiffs by reason of threats and coercion exercised by the defendants. The relief demanded was that the combination be declared unlawful and void, and that the defendants be enjoined from carrying the same into effect, and that the defendants be further enjoined from interfering with the plaintiffs' business, or methods of purchasing books, or from threatening or punishing any persons for dealing with them, and from blacklisting them, and to recover the damages which they may have suffered.

On the 13th of December, 1902, all the defendants excepting Fleming H. Revell Co. and Fowler & Wells and Legatt Brothers, against whom the action had been discontinued, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. These demurrers were sustained at Special Term by Mr.

Justice O'GORMAN. From the interlocutory judgment entered thereon an appeal was taken to the Appellate Division of the First Department, which reversed the interlocutory judgment by a divided Court, Mr. Justice INGRAHAM writing the prevailing opinion, and Mr. Justice McLAUGHLIN writing a short dissenting memorandum in which the Presiding Justice VAN BRUNT concurred, on the ground that the seller of property in respect to which he has a monopoly, can impose any conditions as to its resale he sees fit. Mr. Justice McLAUGHLIN based his dissent on the case of *Park & Sons v. The National Druggist Assn.*, 175 N. Y. 1, in which the manufacturers of certain proprietary articles entered into an agreement, which, in effect, was to maintain the price put upon such articles by the respective manufacturers thereof; he thought that the publishers of copyrighted books had the same right.

The Appellate Division granted permission to appeal to the Court of Appeals and certified to that Court the question whether the complaint stated facts sufficient to constitute a cause of action. In February, 1901, that Court affirmed the decision of the Appellate Division (177 N. Y. 473).

Chief Judge PARKER, writing the prevailing opinion, said amongst other things, as follows:

"That case and many others were considered recently by the United States Supreme Court in *Bement v. National Harrow Co.* (186 U. S. 70), Mr. Justice PECKHAM writing. After an examination of the cases which may be said to restrict the exceptions which grow out of a proper exercise of the police power of the State—of which *Patterson v. Kentucky* (97 U. S. 501) is an illustration—he says (186 U. S. 91): 'Notwith-

standing these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the Courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

That reasoning is employed as to patent rights. It is equally applicable to copy-rights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the *Park & Sons Co.* case (175 N. Y. 1), upon which the defendants apparently rest their claim that the judgment of the Appellate Division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein—which will now be pointed out.

While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protection which the Federal government permits them to enjoy for the reasons stated by Chief Justice MARSHALL (*supra*), it does not stop there. It also affects the right of a dealer to sell books *not* copyrighted at the price he chooses, or to sell at all, if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this State as much as if it related to bluestone (164 N. Y. 401), or to envelopes

(166 N. Y. 292), and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible but probable. But it is not of moment whether such a result is probable or not, for the test to be applied is, What *may* be done under the agreement?"

Judges GRAY and BARTLETT dissented in separate opinions, the fundamental idea of Judge GRAY's opinion being that publishers of a copyrighted book may fix the price at which it is to be resold by virtue of the monopoly granted by the Federal statute, and that what may be lawfully done by each publisher, he may unite with others in doing (page 491).

In accordance with the permission granted by the Court of Appeals, the defendants withdrew their demurrer and on the 16th day of April, 1904, served an answer. A motion was made to make such answers more definite and certain, which was, in part, granted by the Appellate Division (96 A. D. 315), and thereafter an amended answer was served by the American Publishers Association on the 9th day of September, 1904, and by the American Booksellers Association on the 12th day of September, 1904. These answers set up as separate defenses (Record, fols. 107-116) that certain amendments were adopted in March, 1904, restricting the operations of the combination to copyrighted books only; that they had under the statutes and Constitution of the United States the sole liberty of printing, publishing and vending such copyrighted books, and that the combination is in all respects in accordance with the laws of the State of New York and of the United States of America (fols. 115 and 123).

A demurrer to these two separate defenses was overruled (103 A. D. 277). Thereafter and on the 13th day of May, 1907, the case came up for trial at a Special Term of the Supreme Court before Mr. Justice DOWLING without a jury. Before that case came up for trial, several members of the American Publishers Association, influenced, no doubt, by the opinions filed by the Judges of the Court of Appeals, which held that the proprietor of a copyright unquestionably had the power to control the ultimate retail price of his book by virtue of the United States copyright laws, brought actions against R. H. Macy & Co. to restrain them from selling books at less than the price fixed by the respective publishers, and maintained by the rules of the two associations. These actions, *Robbs-Merrill Co. v. Straus* and *Scribner v. Straus*, came up for hearing at Circuit and had been decided in favor of the defendants and against the publishers on the ground that the copyright statutes did *not* have the virtue claimed for them, and neither enabled the owners to fix the ultimate retail price nor empowered them to enter into combinations which as to uncopyrighted books would be condemned by the Federal Anti-Trust Law (139 Fed. Rep. 155). The Circuit Court of Appeals for the Second Circuit had affirmed these judgments on the ground that the copyright statutes practically secured to the owner the monopoly of reprinting, but that when the proprietor had sold the book he had exercised his monopoly of vending, and thereafter he could not control the retail price by virtue of the copyright statutes.

These decisions were called to the attention of Judge DOWLING as conclusive upon the question of the extent of the copyright laws; that the opinions of the Court of Appeals which held a different view

were, therefore, inoperative, being based upon an erroneous conception of the Federal laws. Judge DOWLING refused to adopt this view (see Record, page 171), and awarded judgment to the plaintiffs for only such damages as they had suffered by reason of the combination covering uncopyrighted books, and refused to give any relief as to copyrighted books. Judge DOWLING in his decision (Record, page 113), which was filed on the 19th day of November, 1907, made a number of findings of fact which, in all particulars, sustained the allegations of the complaint, as well as other additional facts which had developed upon the trial, and which will be more fully discussed later on.

From the interlocutory judgment so entered, or at least that portion of it which denied relief as to copyrighted books, the plaintiffs appealed to the Appellate Division. Under the Code of Civil Procedure, the appeal was taken solely for the purpose of correcting the conclusions of law erroneously drawn by the Trial Justice from the findings of fact contained in his decision.

Before that appeal was heard in the Appellate Division, the *Bobbs-Merrill* and *Scribner* cases had been affirmed in the United States Supreme Court (210 U. S. 339). The Appellate Division by a divided court affirmed the judgment below, Judge INGRAHAM and Judge McLAUGHLIN, however, filing dissenting opinions on the ground that the decision in the *Bobbs-Merrill* and *Scribner* cases in the United States Supreme Court had placed copyrighted books in the same class, so far as this action was concerned, as uncopyrighted books, and that a combination in restraint of trade in the one was likewise a combination in restraint of trade in the other and equally unlawful (127 A. D. 935). No appeal lying from the order of affirmance as a

matter of right, the Appellate Division granted permission to appeal and certified to the Court of Appeals the following question, "Are the plaintiffs under the findings of fact contained in the decision in this case entitled, in so far as copyrighted books are concerned, to the relief demanded in the complaint, or to any relief as against the defendants in this action?"

The hearing in the Court of Appeals took place in November, 1908, and in December of that year the Court affirmed the judgment of the Court below by a divided Court of four to three, Judge GRAY writing the prevailing opinion, in which he refused to recede from the position taken by him in his dissenting opinion in the 176th New York. Judge WILLARD BARTLETT dissented on the ground that the view taken by the Court upon the first appeal as to the effect of the copyright laws upon the subject matter of agreements which are attacked as being in restraint of trade, had been rejected in the *Bobbs-Merrill* case (210 U. S., 339). As the judgment appealed from was interlocutory, no appeal could be taken to this Court, and plaintiffs were compelled to go back to Special Term, secure the entry of a final judgment granting them relief only as to uncopyrighted books and to appeal from that portion of the judgment denying relief as to copyrighted books directly to the Court of Appeals, bringing up for review the interlocutory judgment. The judgment of affirmance in the Court of Appeals (199 N. Y., 518) was duly remitted to the Supreme Court of New York, and the final judgment of that Court, entered on the remittitur, is now brought here for review.

The Facts.

There is and can be no dispute whatsoever about the facts in this case. They are all contained so far as this appeal is concerned in the findings of fact filed by Mr. Justice DOWLING on the trial of this case at Special Term (page 115 of the Record).

It appears that prior to and since May, 1901, the plaintiffs were conducting a retail department store in the City of New York, under the firm name of R. H. Macy & Company. They conducted amongst others, a department for the retail sale of all kinds of copyrighted and uncopyrighted books, which in volume amounted to \$250,000 a year.

The defendant, American Publishers Association, was organized under the laws of the State of New York on the 31st day of December, 1900. Its members were corporations, firms and individuals engaged in the business of publishing copyrighted and uncopyrighted books and selling the same at wholesale, or retail, or both, throughout the various States and Territories of the United States. Only publishers of books were eligible to membership in the American Publishers Association. Its membership included all the well known publishers who did in the neighborhood of seventy-five per cent. of the publishing business, not only in the State of New York, but in the whole United States, both in copyrighted and uncopyrighted books. (Finding 8, page 117.)

A number of the members published only copyrighted books, and other members published both copyrighted and uncopyrighted books.

The American Booksellers Association is a voluntary unincorporated association composed of wholesale and retail booksellers throughout the States and Territories of the United States. Its membership included a large majority in numbers

and in extent of business of both the wholesale and retail book trade, and they all dealt in copyrighted and uncopyrighted books. (Findings 13, 14, page 118.)

Prior to May, 1901, books were sold at retail at so-called "list prices," the list price being the published price, from which the retailer allowed various discounts to various people. The plaintiffs had never allowed any discounts, but always sold their books at fixed prices without discount. During the spring and fall of 1900, a number of prominent publishers and booksellers conferred together for the purpose of concerted action looking towards the maintenance of a fixed price by all dealers in copyrighted books. The publishers appointed an Organization Committee which communicated with various booksellers throughout the United States, inviting answers to various questions concerning the establishment of a fixed price, *and the prevention of competition in the sale of copyrighted books.* (Finding 19, page 118.)

On February 13, 1901, the American Publishers Association adopted a resolution which all its members agreed to observe. That resolution was as follows (Ex. A, page 44):

"THE AMERICAN PUBLISHERS ASSOCIATION.

156 Fifth Avenue,
New York.

The following plan to correct some of the evils connected with the cutting of prices on copyrighted books was adopted at the meeting of the American Publishers Association held February 13, 1901:

I. That the members of the American Publishers Association agree that all copy-

righted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

II. It is recommended that the retail price of a net book, marked NET, be printed on a paper wrapper covering the book.

III. THAT the members of the Association agree that such net copyrighted books and all other of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices or whose name has been given to them by the Association as one who cuts such prices or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

IV. That the only exception to the rule of maintaining the retail price shall be in the case of libraries which may be allowed a discount of not more than ten per cent.

Libraries entitled to this discount may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount.

V. That the Association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

VI. That after the expiration of a year from the publication of any such net copyrighted book, dealers shall not be held to the above restrictions and may sell such book at a cut price, but if on learning of such action the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

VII. That when the publisher sells at retail a book published under the rules it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

VIII. That for the purpose of carrying out the above plan the directors of the Association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the Board the Manager shall investigate all cases of cutting reported and when directed shall send out notices to the Association, jobbers and the trade, of any persons violating the above provisions.

IX. That it shall be the duty of all members of the Association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

X. That the Association through its agents and members aid in the formation of booksellers' associations in the important

centres and cities in the United States, the object of which associations shall be to assist the Publishers Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable and uniform methods of business in each important centre or section of the country. That the Association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

XI. That the report when adopted by the Board of Directors be submitted to the Association and voted upon in accordance with the Associations' Rules, Article II, Section I."

The members of the American Booksellers Association sympathizing with the avowed object of the publishers, and their association, to sell at a uniform price all copies of the same copyrighted books to be thereafter published by any member of the American Publishers Association at a net price, adopted a resolution and entered into agreements to co-operate with the Publishers Association, and its members, in the maintenance of such net price system. That resolution appears as Exhibit H, page 109, and is as follows:

"REFORM RESOLUTION No. 1.

Whereas, The American Publishers Association has adopted a net-price system and entered into an agreement for its maintenance, by which the members of said Association will cut off the supply of all their books, net, copyrighted or otherwise, to any

dealer who fails to maintain the net price of any or all books published under the net price system:

1. Now, therefore, be it **RESOLVED**, that this, the American Booksellers Association, in convention assembled, accept the said net price system, with the distinct understanding that it is the intention of the American Publishers Association to include fiction under the net-price system as rapidly as possible, and
2. Furthermore, be it **RESOLVED**, that all members of the American Booksellers Association shall give to each of the members of the American Publishers Association, and to all publishers who co-operate with them in the maintenance of the net-price system, our most cordial support; and that to this end we agree not to buy, not to keep in stock nor to offer for sale, after due notification, the books of any publisher who declines to support the net-price system.
3. Furthermore, be it **RESOLVED**, That we instruct our secretary promptly to notify all members of this Association that this resolution is applicable and in force with reference to any publisher who shall have made it manifest that he is unwilling to co-operate with this Association, and with the members of the Publishers Association, in the maintenance of the net price system.
4. Furthermore, be it **RESOLVED**, That the resolution on being ratified by two-thirds of the members of this association, voting by formal ballot, shall immediately become a law to each and all of the members of this Association; and if it shall appear upon the presentment of any three members of this Association that a member has purchased,

put in stock, or offered for sale, the books of a publisher who has been formally denounced, such member shall be expelled from membership in this Association, and all members of this Association shall then and thereafter be restrained from supplying any books to such expelled member at a discount from the usual net price.

5. Furthermore, be it **RESOLVED**, That all members of this Association shall be restrained from furnishing any books, at less than the net or usual retail price, to any dealer who shall have been denounced by the Publishers Association for cutting the price of net books, or for otherwise violating the net-price system, and who shall have been therefore cut off by the members of the Publishers Association from the supply of their books.

6. Furthermore, be it **RESOLVED**, That all members of this Association shall endeavor to keep in stock and push the sale of net books so long as they are reasonably in demand, provided such discount is allowed by the publishers to the dealers as will yield them a living profit; and they shall maintain the net price of the same in accordance with the terms of the publishers' agreement for the maintenance of the net-price system."

Said resolutions were intended to and did in fact go into effect on the 1st day of May, 1901, since which time the two associations, and their respective members, continually combined and co-operated to carry into effect the rules, regulations and agreements adopted. The majority of copyrighted books were since that time published at net prices pursuant to the rules of the Publishers Association, and a large majority of all dealers through-

out the United States, in accordance with such rules, maintained the net prices of copyrighted books, and competition in the price of such copyrighted books at retail was almost completely destroyed thereby. (Finding 25, page 120.) The general methods employed by the defendants to effect their purpose were as follows:

The Publishers Association received information from the Book Sellers Association as to price cutting and from others, but made investigation for itself before taking action; the Booksellers Association giving advice and suggestions from time to time. The various members gave information of price cutting to their respective associations, and if the fact was established, the American Publishers Association issued a list to its members and to the large jobbing houses, directing them *to discontinue the sale of any books of any kind, whether copyrighted, or uncopyrighted*, to the offenders named in such list. Such list was also furnished to the Booksellers Association and was published in the monthly report of the Secretary, and sent *to all the trade*, under the heading of "DEALERS WHOSE SUPPLIES HAVE BEEN CUT OFF." The publishers further investigated whether a dealer, or publisher, had sold books of any kind, copyrighted or uncopyrighted, to an offender mentioned in the cut-off list, and if it was found that he had furnished books, whether copyrighted or uncopyrighted, such publisher or dealer was likewise placed upon the cut-off list, which thereafter was sent to members of the Publishers Association, and also published by the Secretary of the Booksellers, and circulated among *the trade at large*. In order not only to punish actual price cutting, but to prevent it as far as possible, the publishers circulated a so-called List No. 2, which contained names of dealers who were suspected of *intending* to sell

to so-called price cutters, and its members, and the wholesale jobbers, were warned not to sell any books of any kind, whether copyrighted or uncopyrighted, to any individuals on that list until they had signed an agreement to abide by the rules and regulations of the publishers. (Finding 31, page 121.) That agreement was as follows:

"AMERICAN PUBLISHERS ASSOCIATION.

In consideration of discount allowed on books bought from we hereby agree that for one year from date of publication we will not sell net books at less than the retail prices fixed by the respective publishers, nor fiction published after February 1, 1902, at a greater discount than 28 per cent. at retail, as provided by the rules of the American Publishers Association. We further agree that we will not sell books published by members of the American Publishers Association to any dealer known to us to cut prices of net books or of new fiction, except as provided above."

The cut-off list was circulated not only amongst the members of the Publishers Association, but also amongst jobbers or wholesale dealers, and any dealer who had been placed on such list was not removed therefrom unless he gave satisfactory assurances that he neither would sell at retail at less than the price fixed, nor sell at wholesale or retail to any person accused of selling at retail at less than that price. The Booksellers Association and its members actively co-operated with the Publishers Association and its members in this plan, and its method of execution. In order, moreover, to increase the membership and power of its allied

association, the Booksellers Association invited publishers of copyrighted as well as uncopyrighted books to join the American Publishers Association and abide by its rules. The Association had entered into a special agreement with the Organization Committee of the Publishers Association, that they would not buy, nor put in stock, nor offer for sale, the books of any publisher who did not join the American Publishers Association, and publishers of uncopyrighted books were informed that *all booksellers* were pledged not to deal in the books of any firm, *either copyrighted or uncopyrighted*, which did not co-operate with the American Publishers Association, and that co-operation could only be maintained through *joining* the Publishers Association (Findings 38-41, page 123), the object, of course, being to compel publishers of *uncopyrighted* books to refuse to sell to any dealer who sold *copyrighted* books in violation of the rules. A number of such publishers did in fact join and several who did not join were placed on the cut-off list, and the rules of the two associations were strictly applied to them. Under these agreements and the methods by which they were enforced, any retail dealer who failed to maintain the net price, or any wholesale dealer who supplied books to such a dealer, was cut off from his supply of books of any kind, copyrighted or uncopyrighted, and was thereafter unable to buy any kind of books in the ordinary or usual method.

The plaintiffs had been invited to join the Booksellers Association and had refused to do so. On May 1, 1901, they sold the copyrighted book, "Tarry Thou Until I Come," at \$1.21 per volume. The net price was \$1.40. The Publishers Association requested plaintiffs to sell the book at the net price of \$1.40. They refused. Thereupon the

American Publishers Association advised its members to discontinue the sale of any and all books to R. H. Macy & Co. The Booksellers issued a cut-off list containing the name of R. H. Macy & Co. Thereafter the plaintiffs in the ordinary course of business were unable to secure a supply of books for the department except in unusual ways. (Findings 44-50, pages 124 *et seq.*) They continued, however, to sell the books of the same character, size and style at the same prices after May 1, 1901, as prior to that time, and in each instance such price was less than the net price fixed by the publishers. Every effort was made to ascertain the source of plaintiffs' book supply, including the employment of spies and detectives, and when persons who sold books to the plaintiffs were discovered, they were placed upon the cut-off lists and were deprived of the power to buy books in the usual course. In some instances dealers who had sold to R. H. Macy & Co. were wholly ruined and driven out of business, and the American Booksellers Association widely circulated the names of such dealers and warned everybody in the trade, whether a member of either association or not, to avoid the fate of such booksellers. Circulars were also issued not only to the members of the two associations, but to all the members of the trade, warning them not to deal with the plaintiffs. (Findings 55-59, page 125 *et seq.*)

In 1902, the Publishers Association, at the request of the booksellers, modified its rules so as to provide that books of fiction could be sold at a restricted price, instead of a net price, meaning thereby that the former list price was re-established with a maximum discount fixed by the associations.

After the decision of the Court of Appeals upon the demurrer, in 1904, the two associations changed their rules and regulations, for the purpose of

making them comply with the decision of that Court by excluding uncopyrighted books from their operations. The change thus made, so far as material here, is shown in Paragraph 3 of Exhibit "G," page 105, and is as follows:

"III. That the members of the Association agree that copyrighted books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their *copyrighted* books, *except at retail*, to no one who cuts such net prices.

A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books, and carries stock of them for public sale.

It is further agreed by the members of the Association that they will not themselves offer, nor sell their *copyrighted* books to any one who offers protected books in combination with a periodical, at less than the trade subscription price of such periodical plus the NET or minimum price of the book."

The change in the American Booksellers Association agreement is to like effect and is set forth in Paragraph 2 of Exhibit "I," page 111. The two associations, however, continued the same methods of ascertaining the plaintiffs' supply of copyrighted books, of cut-off lists and of circulars to the trade, and the plaintiffs were compelled to purchase copyrighted books in unusual and indirect ways. About the 19th day of January, 1907, the American Publishers Association again amended its rules (incorporated in the decision of the Court, page 129). It purports in its preamble, to rescind the agreement of 1901, and then adopts a plan

which is practically identical with the former resolutions with the exception of substituting a *recommendation* to the members of the association to maintain prices instead of an *agreement*. The adoption of that resolution, however, did not stop the activity of the association nor change its methods. They continued to issue the cut-off lists upon which the name of the plaintiffs had appeared since 1901, and the manager of the association still continued to look after its affairs. Since the amendment was adopted, both the associations and their respective members continued precisely the same course as to the sale of books as had been established prior to the adoption of such resolution.

The Court made the further findings (findings 70-78 both inclusive, page 128) :

That the copyrighted books covered by the rules included books, the copyrights of which *were not owned* by members of the American Publishers Association.

That the American Publishers Association was not the owner of and had no interest in the copyrights of any of the books published since the 1st day of May, 1901, or prior thereto.

That the American Booksellers Association was not the owner of and had no interest in, the copyrights of any of the books published since the 1st of May, 1901, or prior thereto.

That the members of the American Booksellers Association, who were not publishers, were not the owners of, and had no interest in, any of the copyrights to any books published since the 1st of May, 1901, or prior thereto.

That the members of the American Publishers Association were each sole owners of the copyrights published by them respectively.

That none of the copyrights of the books pub-

lished were owned by any other firm or individual than the one to which such member belonged.

The Court also found that the members of the two associations resided in, and carried on their business of selling books, in many different States of the Union, and were engaged in the business of purchasing books, copyrighted and uncopyrighted, from each other and from other persons in many States other than the State in which the purchaser resided and did business.

That the rules of the two associations, and the agreements of their respective members, were applied against all publishers and dealers in books throughout the different States of the Union whether such publishers and dealers were members of either association or not, and whether they purchased books in one State for transportation and delivery in another, or for delivery in the State where purchased. The Court also expressly held that the members of the two associations, purchased, distributed and sold since May 1st, 1901, and still purchase, distribute and sell at wholesale and retail, *the large majority of all copyrighted and uncopyrighted books dealt in throughout the various States and Territories of the United States.*

The Court found as a Conclusion of Law (page 136) that the agreements and combination were intended to and did prevent competition in the supply and price of books, copyrighted and uncopyrighted, from May 1, 1901, to April 1, 1904. That in so far as uncopyrighted books were concerned, they were unlawful restraints of trade and interfered unduly with the price and supply of books and were intended to establish and maintain a monopoly in the production and sale.

He then expressly held that the combination was not unlawful so far as *copyrighted* books published

by members of the association were concerned, and that plaintiffs were not entitled to any relief, either at law or in equity, against the defendants by reason of any acts of the two associations, or their members concerning copyrighted books.

He refused to find as a conclusion of law, although so requested, that the agreements, resolutions or combinations set forth in the complaint, affected interstate commerce, and were unlawful and contrary to the statutes of the United States, and more particularly the Sherman Anti-Trust Law (Paragraph 5, page 162).

He refused to find further that the owners of several separate copyrights are not empowered to enter into any contract or agreement or combination between themselves concerning the supply and price of books published under separate copyrights, which would be unlawful and contrary to the statutes of the United States against combinations in restraint of trade if entered into with reference to the supply of uncopyrighted books (Par. 9, page 163).

He refused to find that the sole owner of a copyright cannot, after publication, and after he has parted with the title to the copyrighted book, continue to control the sale of such books by reason of any statutory right granted to him. That such control, if it can be secured at all, must be obtained by contract, express or implied, in the same manner as for uncopyrighted books, or any other articles of personal property (Par. 10, page 164).

Due exceptions were taken both to those conclusions of law which denied plaintiffs' right to injunction and damages as to copyrighted books, as well as to the refusal to find the conclusions of law submitted by the plaintiffs which declared the combinations and agreements both as to copy-

righted and uncopyrighted books, contrary to the Sherman Anti-Trust Act of July 2, 1890.

Under the provisions of the Code of Civil Procedure (Sec. 998) these exceptions raised the question whether the learned trial Justice had committed error either in the conclusions that he in fact did draw, or in refusing to find those that were submitted to him.

As the sole questions to be raised on appeal were whether on the state of facts as found by the Trial Justice the proper principles of law had been applied, the appeal was taken solely on the judgment roll, and the evidence taken at the trial was not included in the record.

A writ of error was sued out to this Court on the ground that (Assignments of Error, page 209) :

I.

Said Court erred in holding that the agreements, resolutions or combinations set forth in the complaint which were entered into by the defendants were not unlawful, illegal and contrary to the statutes of the United States, and more particularly of the statute passed on July 2, 1890, known as "An Act to protect trade and commerce against unlawful restraints and monopolies," in so far as concerns copyrighted books.

II.

Error in deciding that the owners of several separate copyrights are empowered to enter by virtue of the copyright laws into contracts or agreements or combinations between themselves concerning the supply and price of books published under their separate copyrights, which would be unlawful and contrary to the statute of the United States passed on the 2nd day of July, 1890, known

as "An Act to protect trade and commerce against unlawful restraints and monopolies" if such books were not copyrighted.

III.

Error in holding and deciding that the resolutions and agreements purporting to restrict the effect of the combinations, arrangements or contracts to copyrighted books set forth in the complaint were lawful and not contrary to the aforementioned statute of the United States known as "An Act to protect trade and commerce against unlawful restraints and monopolies."

IV.

Error in holding and deciding that the owner or proprietor of a copyright can, by virtue of the copyright statutes of the United States, after he has parted with the title to the copyrighted book, continue to control the sale or resale of such books by reason of the copyright law in violation of the aforementioned statute of the United States known as "An Act to protect trade and commerce against unlawful restraints and monopolies."

V.

Error in refusing to hold and decide that the plaintiffs in error were entitled to an injunction and to recover damages against the defendants because of the acts of the defendants in carrying out the arrangements, agreements or contracts set forth in the complaint entered into for the purpose of maintaining and fixing the price of copyrighted works throughout the United States of America and of depriving the plaintiffs in error of their power to purchase copyrighted or uncopyrighted books in the ordinary

course of business contrary to the aforementioned statute of the United States passed July 2nd, 1890, known as "An Act to protect trade and commerce against unlawful restraints and monopolies."

ARGUMENT.

POINT I.

Jurisdiction.

This Court has jurisdiction to review the judgment of the State Court, because that judgment decided against the plaintiffs-in-error a federal right specially set up and asserted by them in the State Courts, which if decided in their favor would have required a contrary judgment.

(a) The federal right thus specially asserted by the plaintiffs-in-error was that the combinations, conspiracies and conduct of the defendants greatly exceeded the lawful extent of the monopoly given to owners of copyrights by the copyright statutes, and in fact constituted an unreasonable restraint of interstate commerce in the supply and price of copyrighted books, and a violation of the prohibitions of the Act of Congress of July 2, 1890, known as the Sherman Anti-Trust Act. The rights asserted by plaintiffs-in-error under this statute against the defense of the copyright laws set up by the defendants in the State Court would, if decided in favor of plaintiffs-in-error, have neces-

sarily required a contrary judgment from the State Court.

For a full discussion of the question of jurisdiction the plaintiffs-in-error beg leave to refer to the brief submitted by them in this Court on the 19th day of February, 1912, in opposition to defendants' motion to dismiss or affirm.

The plaintiffs-in-error presented to the trial Court distinct findings of fact and conclusions of law requesting a definite construction of the federal anti-trust act in their favor on the points involved; findings of fact 5, 8, 12, 13, 14, 19, 25, 28, 38, and especially 76, 77, 78 (all found by the Court, Rec., pp. 115 *et seq.*); conclusions of law V, VII and IX (Rec., pp. 162-163); and duly excepted to the refusal of the trial Court to make these rulings of law; plaintiff's exceptions XV, XVII, XIX, XX (Rec., fols. 501-507), and are strictly within the rule of *Seaboard Air Line Ry. Co. v. Durall*, 225 U. S., 477.

(b) In September, 1909, after the final decision of the State Court, the plaintiffs-in-error commenced an action in the United States Circuit Court for the Southern District of New York against the defendants to recover treble damages under the federal anti-trust act. The defendants pleaded the judgment of the State Court in bar as being *res adjudicata* in favor of the defendants on the question whether the alleged combinations, conspiracies and conduct constituted a violation of the federal anti-trust act, and finally moved for judgment on the pleadings. Judgment in their favor on this plea was ordered by Judge LACOMBE, before whom the motion was heard, and from the final judgment thereon entered the plaintiffs appealed to the Circuit Court of Appeals for the Second

Circuit, and on November 7th, 1912, that Court affirmed the judgment (see the opinions of Judge LACOMBE and of the C. C. A. in that case submitted herewith).

As the action in the United States Circuit Court proceeded entirely on alleged violations of the federal anti-trust act, the decisions of the Circuit Court and of the Circuit Court of Appeals, sustaining the plea, must necessarily proceed on the ground that the decisions and final judgment of the Court of Appeals and Supreme Court of the State of New York involved a determination that the combinations, conspiracies and conduct alleged against the defendants *did not constitute a violation of the federal anti-trust act*.

The opinions of the Circuit Court and of the Circuit Court of Appeals in the Second Circuit are submitted, therefore, as authorities in support of our argument in the present case that a federal question is involved as above stated. Such opinions are as follows:

MOTION FOR JUDGMENT ON THE PLEADINGS.

LACOMBE, C. J.

The pleadings and profert of the record in the other suit brings such record properly before this Court to be considered in disposing of this motion.

The case seems to be on all-fours with *Clabaugh v. Southern Wholesale Grocers' Association*, 181 Fed. Rep., 706. Complainants should not have satisfaction in money twice for the same wrong. Their brief practically concedes this so far at least as concerns damages for uncopyrighted books between May 1st, 1901, and April 30th, 1904 (see page 10). If they had recovered in the other suit for the copyrighted books and the judgment been satisfied, they would have to make the same concession as to these. If

they failed so to recover, not because they could not make proof of defendant's acts or their own losses, but because the State Courts erred in determining the measure of the monopoly given by the copyright statutes, that error will be corrected by the U. S. Supreme Court on the appeal now pending; and, when it is corrected, they will be able to secure the judgment to which their proofs may entitle them.

Even if I felt some doubt about the soundness of the conclusion expressed in the *Claibough* case, I should nevertheless be inclined to grant this motion, because it disposes in advance of a controlling legal proposition, whose disposition may possibly relieve both sides and the court and the jury from a long trial involving very many items of proof.

Motion granted.

Before

COXE, WARD and NOYES,
Circuit Judges.

WARD, *Circuit Judge*:

October 1, 1909, the plaintiffs began this action at law to recover treble damages against the defendants under the Federal Anti-Trust Law of July 2, 1890. The complaint alleges that the defendants, publishers of books, combined to organize a membership corporation under the laws of New York called the American Publishers Association, of which they were members and which included a majority of the publishers in the United States and of which the other defendants were the directors for the first year and also officers or directors of defendant corporations; that the purpose of the

association was to maintain the retail price of copyrighted books and was to be effected by an agreement of the publishers to sell their books, copyrighted or uncopyrighted, only to such dealers as would maintain the net retail price of the copyrighted books; that in further prosecution of the combination the defendants aided the organization of a voluntary unincorporated association to co-operate with the Publishers Association, called the American Booksellers Association, which included a majority of the booksellers of the United States; that the purpose of this organization was to bring about an agreement between the booksellers to maintain the retail price of the publishers' copyrighted books by refusing to sell the books, copyrighted or uncopyrighted, of any publisher who declined to support the combination and by refusing to sell any books at less than the usual retail price to any bookseller who cut the retail price of the publishers' copyrighted books; that these combinations went into operation May 1, 1901, and have been continued ever since, contrary to the provisions of the Anti-trust Law of July 2, 1890, except that in about the month of March, 1904, the Court of Appeals of the State of New York, in an action brought against the defendants herein and others, having declared the foregoing agreements unlawful so far as uncopyrighted books were concerned, the Publishers Association and Booksellers Association modified the said agreements so as to exclude uncopyrighted books, but continued the same illegal combination and conduct in respect to copyrighted books; that because the plaintiffs refused to conform to the regulations of these combinations they were put on a cut-off list, their business followed up by detectives and their supply of books cut off, to their damage in the sum of \$125,000.

The answer of the defendants contained, among other things, a separate defense to the effect that the plaintiffs had brought an action in equity in the Supreme Court of the State of New York December 3, 1902, against them (except defendants Scribner, Scott, Britt, Putnam, Harvey and Appleton, who were trustees and officers of certain of the defendants), for the same cause of action in which the defendants (except the defendants aforesaid) appeared and in which it was so proceeded that the said agreements were held invalid as to uncopyrighted books and valid as to copyrighted books, and an interlocutory judgment was entered May 20, 1909, restraining the defendants from interfering in any way with the purchase by the plaintiffs of uncopyrighted books and directing the plaintiffs' damages to be ascertained by a referee, which judgment was on appeal affirmed by the Appellate Division and by the Court of Appeals. The Referee having subsequently ascertained the damages, final judgment was entered on his report for \$3,673.60, damages and costs, from which judgment the plaintiffs appealed to the Court of Appeals, which affirmed the same. Thereupon they took a writ of error to the final judgment of the Supreme Court of New York, which is now pending in the Supreme Court of the United States. The said judgment was pleaded as *res adjudicata* of all the matters complained of and profert of the same was made.

The plaintiffs replied to this defense that the judgment in the State Court was not *res adjudicata*, and that the cause of action was not the same as that in the action in the State Court because damages in respect to copyrighted books was excluded in the latter action, because the present action was founded on the Federal statute under which the State Court had no jurisdiction, because

there were additional parties to this action and because different periods of time were covered.

The defendants having moved for judgment on the pleadings, LACOMBE, *J.*, granted the motion and dismissed the complaint.

The first contention of the plaintiffs in error is that the record of the cause in the State Court should not have been inspected by the Circuit Judge, because it was not annexed as an exhibit to the answer. This is a very technical objection, especially in view of the fact that the action was referred to by the plaintiffs themselves in their complaint. It would prove a cumbersome practice to load such records upon pleadings. By the proferat the record became a part of the pleading and the Court was bound to inspect it as such. That is the practice in this Circuit (*Bogart v. Hinds*, 25 F. R. 484), and there is abundant authority elsewhere (*American Bell Co. v. Southern Bell Co.*, 34 F. R. 803; *Dickerson v. Green*, 53 F. R. 247; *Germain v. Wilgus*, 67 Fed. Rep. 597; *Heaton v. Schlochtmeier*, 69 F. R. 592). No testimony or affidavits were necessary. The pleadings show that the agreements and conduct complained of in the action in the State Court are exactly the same as those complained of in this action except that, as the plaintiffs themselves have alleged in the complaint, the agreements have been modified since the decision in the Court of Appeals in one particular, viz., so as to confine them entirely to copyrighted books. The combination after this modification was in no sense a new combination.

Reliance is also placed upon the refusal of the Supreme Court in *Pacific Railroad of Missouri v. Missouri Pacific Railway*, 11 U. S. 505, to consider the record of a case referred to in the bill. That was a demurrer

to the bill and the Supreme Court said the record of the case mentioned could not be considered because it was not certified to the Supreme Court as part of the record in the Circuit Court. In this case, however, the transcript of the record of the cause in the State Court on writ of error to the Supreme Court of the United States is a part of the record and contains the judgment roll of the State Court stipulated by the parties to be correct and certification waived.

The point is also made that the judgment was not *res adjudicata* because of the appeal pending to the United States Supreme Court. This fact does not suspend the operation of the judgment as an estoppel (*Parkhurst v. Bardell*, 110 N. Y. 386; *Deposit Bank v. Frankfort*, 191 U. S. 499; 510; *Freeman on Judgments*, Sec. 328).

The fact that the judgment in the State Court depended upon the State statutes and that the complaint in this case is founded on the Federal statute which is not within the jurisdiction of the State Court makes no difference. The plaintiffs having the option to go into either Court chose the State Court and their claim having been there adjudicated, cannot be presented the second time to any other Court (*Clabaugh v. Southern Wholesale Grocers Association*, 181 F. R. 706). It may be admitted that the State Court erroneously held, in view of the subsequent decision of the Supreme Court in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, that the agreements complained of were valid so far as copyrighted books were concerned and that therefore as a matter of law the plaintiffs could not recover damages in respect to them at any time. Still, this question was actually involved in the cause before the State Court which was competent to decide it. Having done so, its

judgment is binding in any subsequent action between the same parties for all time (*Cromwell v. Sac County*, 94 U. S. 351). If the plaintiffs are entitled to any relief they can obtain it only in the original action.

The judgment in the State Court is not prevented from being a bar because of the additional parties in this Court. They were officers of the Publishers Association at its organization, were members and officers of the defendant corporations, took an active part in organizing the combinations complained of, were included in the injunction issued in the State Court action, and were so stated to be in the complaint in this Court. They must be regarded as privy to that action.

The fact that evidence of damages in this action may cover a longer period of time than was covered by the action in the State Court is immaterial. The thing that was adjudicated between the parties in the State Court was that the plaintiffs could recover no damages in respect to copyrighted books at all, be the period of the combination long or short. The decree is affirmed.

~~plaintiffs~~
The ~~defendants~~ in error claimed in that case that the State Court had no jurisdiction of an action to recover treble damages under Section 7 of the federal act, and that so far as the judgments and opinions of the State Courts affected any rights of these plaintiffs under the federal anti-trust act, such decisions were not binding as *authority* upon the federal Courts.

POINT II.

The State Court erred in holding that the agreements, resolutions or combinations set forth in the complaint which were entered into by the defendants were not unlawful, illegal and contrary to the statutes of the United States, and more particularly of the statute passed on July 2, 1890, known as "An Act to protect trade and commerce against unlawful restraints and monopolies," in so far as concerns copyrighted books.

The purpose of the American Publishers Association was to secure the establishment of a fixed price for copyrighted books and to prevent competition in the sale thereof (finding 18 *et seq.*, page 118; Exhibit A, page 44, fol. 130; Exhibit I, page 111, fol. 331). It is obvious that the publishers, some of whom conducted wholesale as well as retail stores (finding 5, page 116) desired to remove from their path in the retail trade all dealers who, satisfied with a smaller profit than was deemed proper, might compete with them for business by reducing the retail price. The wholesale price of books was fixed to a large extent by the retail price. Prior to the time of the combination, the list price, less forty per cent., was the ordinary wholesale price of books (finding 48, page 125). After May, 1901, a discount for wholesale purchasers was twenty-five per cent. from the net

price fixed, with additional discounts for larger quantities (finding 49, page 125; see also Par. 5, Exhibit A, fol. 134). The first step necessary was, of course, to remove competition amongst themselves in their own and each other's publications, so they agreed to establish a fixed price at retail at which all copyrighted books should be sold after a given date (excepting school books and such works of fiction, not juveniles, and new editions, as the individual publisher might desire, excluding books published by subscription and not through the trade). Each publisher voluntarily deprived himself of the power to reduce or vary the retail price of his own publications for a fixed period. If the distribution of books to the public were only in the hands of the publishers, this agreement would have been sufficient to effect all their purposes, but there exists a large class of retail book sellers who purchase at wholesale, either directly from the publishers, or from the wholesale book jobbers. To secure the publishers against outside attacks, these retailers had to be whipped into line, and for that purpose the publishers held out, on the one hand, the temptation of increased profits by the removal of the competition of department stores (finding 92, fol. 399), and on the other hand, the threat that the prominent publishers of the United States, constituting seventy-five per cent. of all the trade, would refuse dealings of any kind with such retailers unless they agreed that they would maintain the established price, not only on the books purchased by them from each individual publisher, but upon all net books sold by any other publisher, that is to say, if Scribners' Sons sold one of their copyrighted publications to a dealer under an agreement to maintain the price fixed by the publisher, a failure to observe that

agreement with Scribners, and a sale of that book at less than the fixed price, would be followed by a refusal of *all* the publishers, who were members of the association, to sell to such retailer *any book of any kind*, whether copyrighted or uncopyrighted, whether published in the United States or abroad. The ordinary bookseller would, of course, in the absence of any other source of supply be compelled either to submit to the plan of the publisher for maintaining retail prices or shut up his shop. But other sources of supply were open to the retailer, and these had to be stopped. There are wholesalers in books, who are not publishers, and if books could be bought from them without any restrictions as to price, the retailers obviously had the power to secure the full stock of goods at wholesale without submitting to any irksome restraints.

The publishers' agreement, however, provided (Par. 3, Exhibit A, page 41) that they would sell to those booksellers and jobbers only *who would resell their books to no one known to them to cut the net price on books, or whose name was given to them by the association as one who cut such price, or failed to abide by the rules of the association*. This completed the chain of control from the publishers directly to the consumer. The wholesale dealer being neither publisher nor retail dealer, had little interest in the maintenance of the retail price, but was dependent upon the publishers for his stock of both copyrighted and uncopyrighted books, and if seventy-five per cent. of the publishers of books throughout the United States agreed not to sell him books of any kind except under certain conditions, he had but little choice. He necessarily either complied or surrendered his business. But even with this control, the publishers were not satisfied. There are pub-

lishers who printed *only* uncopyrighted books. As they had no interest in the destruction of competition in the retail price of *copyrighted* books, the Publishers Association were not likely to induce them to become members, or abide by its rules. Apparently, however, it was deemed necessary to force them into the combination, and the Booksellers Association, composed of a large majority of the retail booksellers throughout the United States, was called upon to assist in effecting this purpose. Accordingly the Organization Committee of the American Publishers Association entered into a special agreement with the members of the American Booksellers Association whereby the members of the latter association bound themselves "*not to buy, not to put in stock, not to offer for sale the books of any publisher who shall have finally declined to co-operate in the maintenance of the net price system by joining the American Publishers Association and issuing books under the net price system*" (finding 38, fol. 368, page 123; Exhibit II; page 169, fol. 327). Publishers of uncopyrighted books were informed by the booksellers of this special agreement as well as that co-operation with the American Publishers Association could only be maintained through joining the American Publishers Association, "*and by abiding by all its rules and regulations*" (findings 39-40, page 123). The sole object of securing the allegiance of the publishers of *uncopyrighted* books to the rules and regulations of the Publishers Association was, and could only be, to *prevent them from selling uncopyrighted books to dealers who were known to cut the price on copyrighted books*, or who resold them to such dealers.

The nature, purpose, object and effect of these resolutions and agreements were clearly to prevent

competition in the retail price of copyrighted books, and one of the means adopted to secure this end was, and was intended to be, the restraint and control of competition in the supply of books of any and all kinds, with the ultimate design of so controlling such supply that the violator of these arbitrary rules could be effectually driven out of business. Nor were these agreements mere empty threats. Spies, boycotts and cut-off lists were in fact resorted to. Some individuals who had supplied the plaintiffs with books were wholly ruined and driven out of business (finding 57, page 126). The names of such persons were held out as a horrible example not only to the members of the two associations but to the trade at large (finding 58). The whole trade was warned against dealings with plaintiffs (finding 59).

When in 1904, the Court of Appeals rendered its decision, the two associations amended their rules so as to make them apply to copyrighted books only. No other change took place, and the defendants claim that the agreements were lawful because they affected only copyrighted books, but their methods were continued in precisely the same way as theretofore.

In 1907, another change was made in the resolutions by which it was pretended that they were rescinded, but they were, in fact, re-enacted with a substitution of the word "*recommendation*" instead of "*agreement*." The same cut-off lists, the same boycotts were, however, continued, and the Court expressly found that no change took place in the methods of the two associations. At that time, the combination had been in force for approximately six years. The Court of Appeals had decided that it was lawful. The system had become

well established. There was absolutely no change in the methods pursued. It may well be assumed, therefore, that this change from an *agreement* to a *recommendation* was a change in form only, and not in substance.

That these agreements restrained trade is obvious.

That they have been entered into by seventy-five per cent. of the publishers of the United States and by a large majority of the booksellers of the United States is established.

That they affected interstate commerce as well as intrastate trade and operated to restrain trade or commerce among the several States necessarily follows from the trial Court's findings of fact.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211.

Swift & Co. v. United States, 196 U. S. 375.

The Court of Appeals (177 N. Y. 473) in fact held that in so far as uncopyrighted books were concerned, the combination was in restraint of trade, and it requires little reasoning to show that it contains every element of illegality as to effect, intent, and method of execution condemned by this Court in the latest, as well as many of the previous decisions.

American Tobacco Co. v. U. S., 221 U. S. 106.

Standard Oil Co. v. U. S., 221 U. S. 1

Montague v. Lowry, 193 U. S. 38.

Swift & Co. v. U. S., 196 U. S. 375.

Standard Sanitary Manufacturing Co. v.

U. S., decided November 18th, 1912, not yet reported.

Dr. Miles Medical Co. v. John D. Parks & Sons, 220 U. S. 373.

United States v. Joint Traffic Asso., 171 U. S. 505.

United States v. Freight Asso., 166 U. S. 290.

Addyston P. & S. Co. v. United States, 175 U. S. 211.

Northern Securities Co. v. U. S., 193 U. S. 197.

In *Montague v. Lowry* (*supra*) an association was formed in California by manufacturers of and dealers in tiles, mantels and grates. The result of the agreement, when carried out, was to prevent a dealer in tiles who was not a member of the association from purchasing the same upon any terms from any of the manufacturers who were such members. The non-member dealer was also prevented, by the agreement, from buying tiles of any dealer in San Francisco, who was a member, excepting at a greatly enhanced price. This Court decided that the combination affected interstate commerce and was in restraint of trade.

In that case, the action was brought against the association and its members to recover damages by a dealer who had been injured. It closely resembled the facts in the case at bar, because the purpose was largely the same, that is to say, the maintenance of prices and the control of the supply of tiles.

In *Dr. Miles Medical Co. v. John D. Park & Sons* (*supra*), the plaintiff in error was the owner of a secret process for the manufacture of a proprietary medicine. He established a system of a series of

contracts, whose purpose was to fix and control the price for all sales, whether at wholesale or at retail. There was in that case, no direct charge of a combination or conspiracy in which others took part. Nevertheless this Court held that the agreements with the trade, having been made with most of the jobbers and wholesale druggists and a majority of the retail druggists of the country, and having for their purpose the control of the entire trade, they related directly to interstate as well as intrastate trade, and operated to restrain trade or commerce among the several States, and that a manufacturer, in the absence of statutory privileges, cannot control prices and destroy competition by agreements which have that for their sole purpose.

The agreements made in that case by the owner of a proprietary article closely resembled the agreements made in the case at bar in so far as price maintenance is concerned and in its provision for the punishment of offenders.

In *Standard Sanitary Manufacturing Co. v. United States* (*supra*) the combinations and agreements affected a patented article, but as the purpose of the license in that case largely tended to fix and maintain prices and prevent competition, the Court held that the mere fact that it covered a patented article did not save it from the condemnation of the anti-trust law.

The same condemnation has been passed upon similar combinations by the Courts in most of the States:

Cohen v. Berlin & Jones, 166 N. Y. 392.

Cummings v. Union Bluestone Co., 164 N. Y. 401.

People v. Milk Exchange, 145 N. Y. 267.

Judd v. Harrington, 439 N. Y. 105.

- People v. Sheldon*, 139 N. Y. 251.
- Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558.
- In re Jacobs*, 98 N. Y. 98.
- People v. Gilson*, 109 N. Y. 389.
- Brown v. Jacob Pharmacy*, 41 S. E. Rep. 553 (Georgia).
- Moore v. Bennett* (Ill. 1892), 15 L. R. A. 361.
- People v. Chicago Live Stock Assn.*, 170 Ill. 556.
- Richardson v. Guhl*, 77 Mich. 632.
- State v. Nebraska Distillery Co.*, 29 Neb. 200.
- Howardson v. Y. & L. Co.*, 111 Wis. 445.
- Morris Run Coal Co. v. Bartley Coal Co.*, 61 Pa. 173.
- Borer v. Trade Council*, 53 N. J. Eq. 301.
- Jackson v. Stanfield*, 137 Ind. 592.

POINT III.

The State Court erred in deciding that the owners of several separate copyrights are empowered to enter by virtue of the copyright laws into contracts or agreements or combinations between themselves concerning the supply and price of books published under their separate copyrights, which would be unlawful and contrary to the statute of the United States passed on the 2nd day of July, 1890, known as "An Act to protect trade and commerce against unlawful restraints and monopolies" if such books were not copyrighted.

Even if the owners of copyrights had the powers under the then existing copyright law erroneously assumed by the Court of Appeals, they nevertheless did not possess the power to enter into contracts amongst themselves, or with others, to extend the monopoly of their respective copyrights beyond the limits granted by the Federal statutes.

It is undeniably true that the owner of a patent, or the owner of a copyright, has a special grant of monopoly, but that does not imply that he can, by reason of such grant, make contracts outside of the boundaries of his monopoly which the patent or copyright laws will protect and secure to him. He is not the beneficiary of a general char-

ter of immunity and privileges exempting him from those restraints of law which surround other and less favored citizens. Even when his personal acts are within the rights expressly granted to him, it does not necessarily follow that he may unite with others in doing the same thing, even if it be of common advantage. The vice in such instances would lie in the combination. Whenever he enters into agreements which transcend what is necessary to protect the monopoly which the law confers upon him, his agreements are subject to the same tests and rules of law as when he is dealing in a wholly unprotected article. This was hinted at in the case of *Bement v. National Harrow Co.*, 186 U. S. 70, and finally decided by this Court in the *Standard Sanitary Manufacturing Co. v. United States*.

In the *Bement* case, the Court held that conditions imposed by the *patentee* and agreed to by the *licensee* as to the right to manufacture, use or sell, the article would be upheld though the license might contain conditions which otherwise would be condemned. But as was stated at page 94:

"The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business *more than the patent provided for*, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows."

It then goes on to say:

"It must, therefore, be conceded that the escrow agreement above set forth looks to the signing by the parties mentioned there-

in of contracts similar to those between the parties to this suit, designated A and B, and containing like conditions relating to the patents respectively owned by such parties. *But there is no finding by the Referee that such contracts were in fact entered into by those other parties nor that they constituted a combination of most if not all of the persons or corporations engaged in the business concerning which the agreements between the parties to these were made. If such similar agreements had been made and if, when executed, they would have formed an illegal combination within the Act of Congress, we cannot presume for the purpose of reversing this judgment in the absence of any finding to that effect, that they were made and became effective as an illegal combination. As between these parties we hold that the agreements A and B actually entered into were not a violation of the Act."*

In the *Standard Sanitary* cases (*supra*), the owner of several patents gave uniform licenses for a certain process of enameling iron ware to a large majority of the manufacturers. It granted to the licensees the right to use the patents upon certain terms and conditions, amongst others, a schedule of prices as established from time to time, to be maintained by all jobbers and dealers. Various penalties were affixed for a breach of the license. Mr. Justice McKENNA, delivering the opinion of the Court, says:

"By the agreements, they were combined, subjected themselves to certain rules and regulations among others not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into

the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers."

He further says:

"The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it,"

and after distinguishing the *Bement* case and the case of *Henry v. A. B. Dick Co.* (224 U. S., 1), he says:

"The agreements in the case at bar combined the manufacturers and jobbers of enameled ware very much to the same purpose and results as the association of manufacturers and dealers in tiles combined them in *Montague & Co. v. Lowry*, 193 U. S., 38, which combination was condemned by this court as offending the Sherman Law. *The added element of the patent in the case at bar cannot confer immunity from a like condemnation, for the reasons we have stated.* And this we say without entering into the consideration of the distinction of rights for which the Government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights a universal license against positive prohibitions. The Sherman Law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."

In that case, the patentee attempted to evade the effect of the Sherman Law by licensing the various manufacturers who constituted the majority of the trade. That license agreement did, in fact, give to the licensee rights which theretofore they did not enjoy, but the condition of enjoyment was practically the maintenance of uniform prices.

In the case at bar, there is no pretense of any license agreement. It is expressly found by the Trial Court that each owner was the independent possessor of the copyright of books which he published and that none of the other publishers had any interest therein. The booksellers and the wholesale dealers had absolutely no interest in the copyright.

The agreements further controlled the supply and price of the books published under copyrights owned by the members of the American Publishers Association, and also the supply, in the first instance, of all books whether copyrighted or not, and after 1904, of *all copyrighted* books whether published by the members of the Publishers Association, or not.

As in similar cases, the defendants claimed that the establishment and maintenance of prices, and the other regulations which they adopted were beneficial to the trade and acquiesced in by a large majority of the trade. But as was said by Mr. Justice HUGHES, in *Dr. Miles Medical Co. v. John D. Park & Sons*:

"The agreements or combinations between dealers having for their sole purpose the destruction of competition and the fixing of prices are injurious to the public interests and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer."

The case of *Henry v. Dick* (*supra*), as has been pointed out by Mr. Justice MCKENNA in *Standard Sanitary* cases, is not antagonistic to the views therein expressed. In that case, in construing the patent law, this Court decided that the owner of a patent had a right to control its use, and that when he exercised that right within the field of his express monopoly, he could restrain another or different use by virtue of the patent law. This, however, cannot be twisted into an authority for the proposition that the owner of a patent can *combine* with the owners of all other similar patents to protect the use of his machine or of those of other patentees for the purpose of dominating or controlling an entire trade, and of excluding from such trade and destroying the business of any person who ventured to violate the license agreement of one, or several of the patentees who are parties to such agreement. If any portion of the opinion of Mr. Justice LUTON in the *Dick* case can be construed to uphold a different view, it was not necessary to the decision on the facts then before him, was clearly *obiter*, and was certainly not adopted in the *Standard Sanitary* cases.

POINT IV.

The Court of Appeals erroneously held that the owner of a copyright has the power, by virtue of the copyright statutes, to control the ultimate retail price, and erred in deciding that the owner or proprietor of a copyright can, by virtue of the copyright statutes of the United States, after he has parted with the title to the copyrighted book, continue to control the sale or resale of such books by reason of the copyright law in violation of the aforementioned statute of the United States known as "An Act to protect trade and commerce against unlawful restraints and monopolies."

The vice of the agreements in question here is the fact that the owners of the separate copyrights have *combined* to fix and maintain the price on their respective books and to control the supply thereof. The decision of the Court of Appeals assumed that in as much as the owner of a patent had the right to control its use, that the owner of a copyright could, by analogy, control the price and that if he so could control the price he could lawfully unite with others in doing so. As shown in the previous argument, even assuming that the owner of a copyright could control the ultimate

retail price, he might not have the right to unite with others in doing what he could lawfully do himself.

The Court, however, wholly misinterpreted the scope and extent of the copyright laws and despite the decision in the *Bobbs-Merrill* and *Scribner* cases, 210 U. S., 339, the Court refused to change its opinion, because

"The question of the extent to which the rights conferred by the copyright statutes may be protected by contract is still an open one in the United States Supreme Court. The case of *Bobbs-Merrill Co. v. Straus* (210 U. S., 339), differs in the important fact that there was no such contract as was in question here. * * * Until the United States Supreme Court has pronounced differently upon such an agreement concerning the future sales of copyrighted books as is now in question, our former decision stands as the law of the case; however, it may be argued that in some other action the decision of the federal tribunal warrants a different inference as to the interpretation to be given to the copyright statute" (193 N. Y., 498).

Judge WILLARD BARTLETT, writing the dissenting opinion, states what plaintiffs believe is the correct rule that should have been adopted by the Court:

"The view which this Court adopted upon the first appeal in this case as to the effect of the copyright laws of the United States upon the subject matter of the agreements which are attacked as being in restraint of trade has, it seems to me, been quite distinctly rejected in a subsequent decision by the Supreme Court of the United States in a litigation to which the plaintiffs here were

parties (*Bobbs-Merrill Co. v. Straus*, 210 U. S., 339). On the previous appeal in this court, Chief Judge PARKER, after quoting the language used by the United States Supreme Court in *Bement v. National Harrow Co.* (186 U. S., 70), to the effect that the courts would uphold any conditions not in their very nature illegal in regard to *patents*, imposed by the patentee and agreed to by the licensee, for the right to manufacture or use or sell the article, went on to say that such reasoning, although employed in the case cited in respect to patent rights, was 'equally applicable to copyrights.' On the other hand, Mr. Justice DAY, writing for the Supreme Court of the United States in the *Bobbs-Merrill* case, expressly declares that 'there are differences between the patent and copyright statutes in the extent of the protection granted by them,' and cites with approval an opinion by Circuit Judge LUTON, in which he said that these differences are so wide 'that the cases which relate to the one subject are not controlling as to the other' (210 U. S., on p. 246). In the *Bobbs-Merrill* case the owner of a copyrighted book inserted below the copyright notice in each copy, the following statement: 'The price of this book at retail is \$1.00 net. No dealer is licensed to sell it at less price and a sale at a less price will be treated as an infringement of the copyright.' The question presented for decision was whether the sole right to vend given to the owner of the copyright by the Federal Law was such as to 'secure to the owner of the copyright the right after a sale of the book to a purchaser to restrict the future sale of the book at retail to the right to sell it at a certain price per copy because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to the one undertaking to sell

for less than the named sum?" The Court answered this question in the negative, holding in substance that while the copyright laws secure to the owner of a copyright the right of multiplication and the right to vend copies, he may not qualify the title of a future purchaser by means of such a notice as has been quoted. The fair import of the decision is that the owner of a copyright obtains nothing as such under the Federal law, but the exclusive right to publish and multiply copies of the protected work and vend the same. Where he sells copies, the contracts of sale are unaffected by the copyright statutes but are subject to the same rules of law as those which apply to contracts for the sale of other personal property.

If I understand the decision in the *Bobbs-Merrill* case correctly, the fact that the agreements in question here related to copyrighted books could not operate to make those agreements valid if they were otherwise in violation of the statutes forbidding contracts in restraint of trade. In other words, a copyright does not carry to the owner thereof any more right to enter into a contract in restraint of trade in the copyrighted book than he has to enter into a contract which will restrain trade in a book which is not copyrighted."

In any event, the rule earnestly contended for by the plaintiffs since the commencement of this action that neither the patent nor the copyright law conferred any immunity from condemnation of agreements which go beyond the precise terms of the monopoly granted or what is necessarily implied, has been finally established in the *Standard Sanitary* case.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the State Court be reversed so far as appealed from and the case remanded.

Respectfully submitted,

EDMOND E. WISE,
Solicitor for Plaintiffs-in-Error.

WALLACE MACFARLANE,
EDMOND E. WISE,
Of Counsel.



16

FILED.

JAN 8 1913

JAMES H. McKENNEY,

CLERK.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 129

ISIDOR STRAUS and another composing the
firm of R. H. MACY & Co.,
Plaintiffs and Plaintiffs-in-Error,

vs.

AMERICAN PUBLISHERS' ASSOCIATION,
et al.,
Defendants and Defendants-in-Error.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR

JOHN G. MILBURN,
STEPHEN H. OLIN,
Of Counsel.

OLIN, CLARK & PHELPS,
Attorneys for Defendants-in-Error,
34 Nassau Street, New York City.

INDEX.

	PAGE
I. Point in reply to plaintiffs' points on motion to dismiss.	2
A. Plaintiffs' admission as to copyright question..	2
B. Plaintiffs' admission as to the question raised on the appeals.....	3
C. Authorities cited by plaintiffs distinguished...	6
D. The Sherman Act, even if it rendered the agreement void, would not be applicable in this suit	9
II. Statement of argument	11
1ST POINT. Refusal to apply Sherman Act was not error	13
A. Because that act will not sustain a recovery in a State Court	13
B. Because the act is not applicable in an equity suit not brought by the Attorney General...	17
C. Because the federal and state anti-monopoly statutes are not applicable to the same sub- ject-matter in one action.....	18
D. Because the complaint did not allege facts showing restraint or monopoly of interstate commerce	20
2ND POINT. It was not error to dismiss the suit as to copyrighted books, because	
A. The plaintiffs did not come into Court with clean hands and their dealings with defend- ants' copyrighted books were.....	23
(a) monopolistic	24
(b) injurious to the defendants and their customers	25
(c) fraudulent to the public.....	28
B. The plaintiffs suffered no legal damage by reason of the agreements and acts com- plained of	31
3RD POINT. It is lawful for a publisher when selling his copyrighted books at wholesale to fix by agreement the retail price at which such books may be sold during a period of one year.....	36
4TH POINT. The agreement of the American Pub- lishers' Association was not in viola- tion of the Sherman Act.....	51
5TH POINT. An answer to the brief of plaintiffs in error	61

A. The statement of facts.....	PAGE 62
B. Point I	62
C. Point II	64
D. Point III	65
6TH POINT. If the writ of error is not dismissed the judgment should be affirmed.....	66

INDEX OF AUTHORITIES.

<i>Allen vs. Alleghany Co.</i> , 196 U. S., 458, 465.....	22
<i>American Livestock Com. Co. vs. Livestock Exchange</i> , 143 Ill., 210	55
<i>Anderson vs. U. S.</i> , 171 U. S., 604.....	52, 60
<i>Aronson vs. Baker</i> , 43 N. J. Eq., 365, 369.....	44
<i>Arthur, et al., vs. Oakes</i> , 63 F., 310.....	66
<i>Ashley vs. Rocky Mountain Bell Tel. Co.</i> , 25 Mont., 286.....	34
<i>Authors & Newspapers' Ass'n vs. O'Gorman Co.</i> , 147 F., 616, 621	32
<i>Bement vs. Harrow Co.</i> , 186 U. S., 70.....7-8, 13, 14, 38, 47, 48	
<i>Bobbs-Merrill Co. vs. Straus</i> , C. C. A., 147 F., 15, 23.....	41
<i>Bobbs-Merrill Co. vs. Straus</i> , 210 U. S., 339, 348.....3, 40, 45, 48	
<i>Bradt vs. Krank</i> , 164 N. Y., 515, 519.....	22
<i>Brightson vs. Claffin Co.</i> , 180 N. Y., 76, 81.....	22
<i>Brown vs. Weir</i> , 95 A. D., 78.....	34
<i>Callaghan vs. Myers</i> , 128 U. S., 617.....	42
<i>Central Coal & Coke Co. vs. Hartman</i> , C. C. A., 111 F., 96.....	31
<i>C. B. & Q. Railway Co. vs. Illinois, ex rel., Drainage Com- missioners</i> , 200 U. S., 561.....	6
<i>Comstock vs. Johnson</i> , 46 N. Y., 615.....	23
<i>Constitution</i> , Art. 7, Sec. 8.....	39
<i>Cooper vs. Stephens</i> [1895], 1 Ch. Div., 567.....	45
<i>Copyright Law</i> , Secs. 1, e, 2, 6, 7, 25 (e), 31 proviso.....	41
<i>Daly vs. Webster</i> , 56 Fed., 483, 488, C. C. A.....	43
<i>Dewey vs. Des Moines</i> , 173 U. S., 193.....	66
<i>Doan vs. Am. Book Co.</i> , C. C. A., 105 Fed., 772, at foot p. 776.....	43
<i>Dobbins vs. Duquid</i> , 63 Ill., 464.....	34
<i>Dr. Miles Medical Co. vs. John D. Park Sons & Co.</i> , 220 U. S., 373, 405.....49, 56, 57, 58	
<i>Drone on Copyright</i> , 383; 387-399, 443, 467; 365.....41, 42, 43	
<i>Eddy on Combinations</i> , Vol. I, Sec. 329.....	25
<i>Edison Phonograph Co. vs. Kauffman</i> , 105 F., 960.....	38
<i>Edison Phonograph Co. vs. Pike</i> , 116 F., 863.....	38
<i>Fetridge vs. Wells</i> , 4 Abb. Pr., 144.....	23
<i>Fetridge vs. Wells</i> , 13 How Pr., 385, 388.....	30
<i>Fonotipia, Ltd., vs. Bradley</i> , 171 F., 951, 959.....	55
<i>Freeman vs. Grant</i> , 132 N. Y., 22, 29.....	22
<i>French vs. Fining</i> , 102 Mass., 132.....	34
<i>Gilmore vs. Anderson</i> , 38 F., 846.....	42

<i>Greene Bay & Miss. Canal Co. vs. Pallen Paper Co.</i> , 172 U. S., 58.....	7
<i>Greer Mills & Co. vs. Stoller</i> , 77 F., 1.....	18
<i>Hamilton vs. McPherson</i> , 28 N. Y., 72, 76, 77.....	34
<i>Hamilton Co. vs. Massachusetts</i> , 6 Wall., 632.....	6
<i>Harding vs. Illinois</i> , 196 U. S., 78.....	6, 7, 9
<i>Harper Bros. vs. Donohue</i> , 144 F., 491, 492.....	42
<i>Harper vs. Ranous</i> , 67 F., 904.....	42
<i>Heim vs. N. Y. Stock Exchange</i> , 64 Misc., 529, 31.....	53
<i>Henry vs. Dick Co.</i> , 224 U. S., 1.....	38, 41, 48, 49, 64
<i>Hopkins vs. U. S.</i> , 171 U. S., 578.....	52
<i>Hudson vs. Patten</i> , 1 Root (Conn.), 133.....	43
<i>Joseph vs. Sulzberger</i> , 136 A. D., 499, 508.....	35
<i>Kipley vs. Illinois</i> , 170 U. S., 182, 187, 188, 189.....	22
<i>Kipling vs. Putnam</i> , 120 Fed. Rep., 631, 634, C. C. A.....	41
<i>Laurence vs. Porter</i> , 63 F., 62.....	34
<i>Layton vs. Missouri</i> , 187 U. S., 356.....	22
<i>List Pub. Co. vs. Keller</i> , 30 Fed., 772.....	42
<i>Locker vs. Amer. Tobacco Co.</i> , 121 A. D., 443, 458, affirmed on opinion below, 195 N. Y., 565.....	10, 16
<i>L. & N. R. R. Co. vs. Sullivan Timber Co.</i> , 138 Ala., 379.....	34
<i>Macgillivray on Copyright</i> , 281, 282.....	42
<i>Manhattan Medicine Co. vs. Wood</i> , 108 U. S., 218, 227.....	23
<i>Marshall Co., Ltd., vs. Bull, Ltd.</i> , 85 Law Times Rep., 77, 82.....	45
<i>Message of the President to Congress</i> , Dec. 5, 1911.....	25
<i>Michigan Pipe Co. vs. Fremont Ditch Pipe Line & Reservoir Co.</i> , C. C. A., 111 F., 284, 287.....	23
<i>Milton vs. Hudson R. Steamboat Co.</i> , 37 N. Y., 210, 214, 215.....	34
<i>Minnesota vs. Northern Securities Co.</i> , 194 U. S., 48, 68.....	14
<i>Montague & Co. vs. Loxry</i> , 193 U. S., 38.....	65
<i>Murphy vs. Christian Press Ass'n</i> , 38 A. D., 426, 430, 43, 44, 50, 52.....	32
<i>National Fireproofing Co. vs. Mason Builders' Ass'n</i> , C. C. A., 169 F., 259.....	10, 15, 17
<i>National Phonograph Co. vs. Schlegel</i> , 128 F., 733, 735, C. C. A.....	38
<i>Nordenfeldt vs. Maxin-Nordenfeldt Co.</i> [1891], A. C., 565.....	57
<i>Northam vs. Dutchess Co. Mut. Ins. Co.</i> , 177 N. Y., 74.....	29
<i>Ogilvie vs. Merriam Co.</i> , 149 Fed., 858, 862.....	46
<i>Park & Sons Co. vs. Hartman</i> , 153 F., 24.....	38, 44
<i>Park & Sons Co. vs. National Wholesale Druggist Ass'n</i> , 155 N. Y., 1.....	25, 41, 53
<i>Parsons vs. Sutton</i> , 66 N. Y., 92.....	34
<i>Parton vs. Prang</i> ; opinion of Clifford, J. [3 Cliff., 537].....	43
<i>Patterson vs. Ogilvie Pub. Co.</i> , 119 F., 451, 453.....	45
<i>Penna. R. R. Co. vs. Hughes</i> , 191 U. S., 477.....	15
<i>Pidock vs. Harrington</i> , 64 F., 821.....	18
<i>Pomeroy Equity Jurisprudence</i> , Vol. 1, Secs. 404, 398.....	25

	PAGE
<i>Pope vs. Terre Haute Car & Mfg. Co.</i> , 107 N. Y., 61, 66	22
<i>Reed vs. Holliday</i> , 19 F., 325	42
<i>Reed vs. McConnell</i> , 133 N. Y., 425, 434	22
R. S., No. 4884	39
R. S., No. 4952	39, 40
<i>Robinson on Patents</i> , Vol. I, Sec. 824	38
<i>Rochester Lantern Co. vs. Stiles & Parker Press Co.</i> , 135 N. Y., 209, 217	34
<i>Rudell vs. Grand Rapids Cold Storage Co.</i> , 136 Mich., 528	34
<i>Sherman Act</i> , Secs. 7, 4	14
<i>Scherrer vs. Baltzer</i> , 84 Ill. App., 126	34
<i>Second Employers' Liability Cases</i> , 223 U. S., 1, 55, 56	14, 19
<i>Sedgwick on Damages</i> , Vol. I, Secs. 202, 143	31, 34
<i>Southwick vs. First National Bank of Memphis</i> , 84 N. Y., 420	22
<i>Standard Oil Co. vs. U. S.</i> , 221 U. S., 1, 58	52, 62
<i>Standard Sanitary Mfg. Co. vs. U. S.</i> , 226 U. S., 20, C. C. A., 191 F., 172	52
<i>State of Missouri vs. Associated Press</i> , 51 L. R. A., 151, at 170	16
<i>Stevens vs. Gladding</i> , 17 How. (U. S.), 447	45
<i>Story vs. Holcombe</i> , 4 McLean, 306	42
<i>Straus vs. Amer. Pub. Ass'n</i> , 85 A. D., 460, 177 N. Y., 473	4
<i>Straus vs. Amer. Pub. Ass'n</i> , C. C. A., brief of plaintiffs in error, p. 35	18
<i>Straus vs. Amer. Pub. Ass'n</i> , 177 N. Y., 473	5, 27, 44, 52
Gray, J., p. 488	39
<i>Straus vs. Amer. Pub. Ass'n</i> , 177 N. Y., 473, opinion of Bartlett, J., p. 493	26
<i>Swift & Co. vs. Johnson</i> , 138 Fed., 867, 873	35
<i>The Conqueror</i> , 166 U. S., 110	31
<i>Toledo Computing Scale Co. vs. Computing Scale Co.</i> , C. C. A., 142 F., 919	23
<i>Tripp vs. Santa Rosa R. R. Co.</i> , 144 U. S., 126	22
<i>Troxell vs. D. L. & W. R. R. Co.</i> , 185 F., 540, 541	21
<i>Truesdell vs. Savles</i> , 104 N. Y., 164	22
<i>Uri vs. Hirsch</i> , 123 F., 568, 578	30
<i>U. S. vs. Knight Co.</i> , 156 U. S., 1	18
<i>U. S. vs. Reardon & Sons</i> , 191 F., 454, 458	55
<i>Verplanck vs. Van Buren</i> , 76 N. Y., 247	31
<i>Vencell vs. O. & K. C. R. Co.</i> , 132 Mo. App., 722	34
<i>Victor Talking Machine Co. vs. The Fair</i> , 123 F., 424, 61 C. C. A., 58	38
<i>Warren vs. Stoddart</i> , 105 U. S., 224	34
<i>Werckmeister vs. Amer. Lith. Co.</i> , C. C. A., 134 F., 321	40
<i>West Chicago Street R. vs. Chicago</i> , 201 U. S., 506	6
<i>Western Union Tel. Co. vs. Wilson</i> , 213 U. S., 52, 54	22
<i>West Pub. Co. vs. Latcyers' Co-op. Pub. Co.</i> , 64 Fed., 360	42
<i>Worden vs. California Fig Syrup Co.</i> , 187 U. S., 516, 528, 530	30

Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 172.

ISIDOR STRAUS and another com-
posing the firm of R. H. MACY
& Co.,

*Plaintiffs and Plaintiffs
in Error.*

VS.

AMERICAN PUBLISHERS' ASSOCIA-
TION, *et al*,

*Defendants and Defendants
in Error.*

In error to the Supreme Court of the State of
New York.

BRIEF ON BEHALF OF THE DE- FENDANTS IN ERROR.

Statement.

On Monday, October 19th, 1911, the defendants in error moved to dismiss the writ of error or to affirm the judgment. The Court directed the motion to stand over until the argument on the writ of error.

Counsel for the defendants before making general argument of the case respectfully submit a

POINT.

In reply to the plaintiffs' "Points in opposition to motion to dismiss Writ of Error."

A.

In our brief on the motion we contended (at page 14) that the Court has no jurisdiction to review the decision of the state courts concerning the effect of the copyright act, because the plaintiffs in error claimed no title, right, privilege or immunity under the copyright act. The defendants claimed such a right, privilege or immunity, and the decision was in favor of their claim.

In their Point III the plaintiffs in error say:

"Even on the defendants' side it is obvious that the decision in this case turned on a federal question, and it is argued by the defendants in error that the right asserted by them under the copyright laws, though a federal question, is not available to the plaintiffs in error in the Supreme Court to sustain jurisdiction, because the federal right which the defendants asserted was decided in their favor.

This is unquestionably correct as a general rule" (p. 26).

The learned counsel suggest that the ruling on the tenth proposed conclusion of law may be an exception to the general rule.

It is enough to say that no reference to this exception is to be found in the assignments of error, and therefore the case is governed by the general rule, and our Point I is sustained by the plaintiffs' admission.

B.

We argued (pp. 16, 17, 18) that the right claimed under the Federal anti-trust act in relation to copyrighted books which is set forth in the assignments of error was never presented to the appellate courts by adequate specification.

This contention is fully sustained by the statement of facts made by the plaintiffs on the motion to dismiss. Counsel, without reference to the record, describe the purpose, the conduct and the result of the appeals. *The Federal anti-trust law is not referred to*, and it is shown that the question which the appellants intended to raise was the very question which the courts considered and decided, namely, whether "*the decision of the Court of Appeals (177 N. Y., 473) in respect to the proper construction of the Federal copyright laws should be held to be erroneous.*"

We quote from the brief of the plaintiffs in error:

"Before their appeal (to the Appellate Division) was heard, this Court had decided the case of *Bobbs, Merrill Co. v. Straus* (210 U. S., 339), and indeed it was in hope of this decision that the appeal of the plaintiffs in error to the Appellate Division was taken. The Appellate Division and the Court of Appeals had denied relief to the plaintiffs in respect to copyrighted books solely by reason of the construction those courts placed upon the copyright laws, namely, * * *

"The plaintiffs not unreasonably supposed that when by its decision in *Bobbs, Merrill Co. v. Straus* this Court had authoritatively determined that the copyright laws of the United States did not authorize such an as-

founding result the Appellate Division and the Court of Appeals would be quick to recognize their error, and, while the case was still before them for consideration and open to any judicial action they might determine to be proper, would grant to the plaintiffs the relief for which they prayed in respect to copyrighted books also.

"The Appellate Division, however, by a majority vote, affirmed the interlocutory judgment in these words:

"Judgment affirmed with costs, on the authority of 177 N. Y., 473." Justices Ingraham and McLaughlin dissented, stating in their opinion that *the whole foundation of the previous decision of the Appellate Division (85 App. Div., 460) and of the Court of Appeals (177 N. Y., 473) in respect to copyrighted books had been completely overthrown by the decision of Bobbs, Merrill v. Straus* * * *

"It is sufficiently obvious that the decision of the Appellate Division as a court was based on the reasonable ground that *as the Court of Appeals also had maintained this erroneous view of the effect of the federal copyright laws*, a proper respect for the decision of the superior tribunal required the Appellate Division to leave it to the Court of Appeals to *change its former opinion*. * * * The Court of Appeals, when the question certified from the Appellate Division was presented to it *and argument made as to the effect of the decision of this Court in the Bobbs-Merrill case upon the previous decision of the Court of Appeals*, refused, by a divided court, to *change its former decision*, declaring in effect that *even if the decision of this Court in the Bobbs-Merrill case*

*showed that the views previously expressed by the Court of Appeals (177 N. Y., 473) were erroneous in respect to the construction of the federal copyright statutes—and this the Court of Appeals did not admit—still the decision in 177 N. Y., 473, was the law of this case, and the court would not change it. Judge Bartlett, writing for the three dissenters out of the seven judges who composed the court, took the position that the decision in the Bobbs-Merrill case was wholly irreconcilable with the former decision of the Court of Appeals (177 N. Y., 473) in respect to copyrighted books, and that as the federal laws are paramount on this subject, and the Supreme Court of the United States is the final arbiter of questions arising under those laws, its decision should be respected and applied (193 N. Y., 502). The Court of Appeals, therefore, by a divided vote, affirmed the order.” * * **

Brief of plaintiffs in error, pp. 8, 9, 10.
(Italics ours.)

There is not a word in all this of the Federal question set up in the assignments of error.

The statement establishes beyond peradventure our contention that the only question presented to the Court of Appeals was whether under the proper construction of the copyright act the decision ought to be in favor of the right, privilege or immunity specially set up and claimed by the defendants under that act. The opinions show that the question raised by the assignments of error was not considered by the courts. The brief shows that no such question was involved in the grounds on which the appeal was taken and

argued. These facts are decisive of the jurisdiction of this Court.

"It is not enough that there may be somewhere hidden in the record a question, which, if raised, would be of a Federal nature."

Dewey v. Des Moines, 173 U. S., 193, 199.

Hamilton Co. v. Massachusetts, 6 Wall., 632.

C.

In Point I of the brief of plaintiffs in error our argument at pages 16-20 is not answered in detail and no attempt is made to show adequate specification of the assigned errors in the appellate courts.

Five cases are referred to:

In *Dewey v. Des Moines*, 173 U. S., 193, the validity of a state assessment was drawn in question on the ground of its being repugnant to the Constitution of the United States.

In *C. B. & Q. Railway v. Drainage Commissioners*, 200 U. S., 561, the question was as to the validity of a state statute under the Constitution of the United States.

In *West Chicago Railroad v. Chicago*, 201 U. S., 506, an ordinance passed under the authority of a state was claimed to be repugnant to the Constitution of the United States.

In *Harding v. Illinois*, 196 U. S., 78, the constitutionality of a state statute was drawn in question.

All these cases fall within the second class of cases provided for in R. S., Section 709:

"It has been frequently held that in cases coming within this class, less particularity is required in asserting the Federal right than in cases in the third class, wherein a right, title, privilege or immunity is claimed under the United States, and the decision is against such privilege or immunity. In the latter class the statute requires such right or privilege to be 'specially set up and claimed.' Under the second class it may be said to be the result of the rulings in this Court that if the Federal question appears in the record in the state court and was decided, or the decision thereof was necessarily involved in the case, the fact that it was not specially set up will not preclude the right of review here."

Harding v. Illinois, 196 U. S., 78, 85.

In *Green Bay & Canal Co. v. Patten Paper Co.*, 172 U. S., 58, the Canal Company explicitly claimed as the foundation of its alleged rights acts of Congress and transactions with the United States.

In all these cases less particularity was required in presenting the case to the appellate courts than in the case at bar and in each of them greater particularity was in fact shown.

In all of these cases a Federal question was involved which, if noticed at all, would be decisive of the case. In the case at bar, the plaintiffs asserted that the agreement was unlawful under both the state and the Federal anti-trust statute. The Court of Appeals, in construing the complaint on demurrer said that the agreement was unlawful under the state statute, but, because this Court, in *Bement*

equivalent. The court, therefore, was not "bound to go further and inquire whether the second claim asserted by the plaintiffs in avoidance of the defense * * * was well founded." Nor would the admission of the plaintiffs' claim require a contrary judgment, since the plaintiffs treated the statutes as equivalent and if they are equivalent the judgment must be the same.

"There is nothing to prevent a party from waiving a Federal right of this character if he chooses to do so, either in express terms or as a necessary implication from his manner of proceeding in the cause."

Harding v. Illinois, 196 U. S. 78, 88.

D.

In Point II counsel claim that because in *Beement v. Harrow Co.* this Court held that the Federal anti-trust act is a good defense in a suit brought on a contract void under the act, therefore it is a ground of action in the case at bar.

"It is not sufficient to show that the agreement in question may create a monopoly, may be in restraint of trade, or may be opposed to public policy. Agreements of that nature are invalid and unenforceable. The law takes them as it finds them, and as it finds them leaves them; but they are not illegal in the sense of giving a right of action to third persons for injury sustained.

"And upon such principles it seems equally clear that they afford such persons no ground for seeking an injunction against injury threatened."

National Fireproofing Co. v. Mason Builders Ass'n., C. C. A. 169 F. 263.

Counsel argue that plaintiffs did not seek to enforce the Federal anti-trust statute but only to apply it. The distinction seems unimportant in view of the authority cited, which holds that in cases like the present the Federal statute is neither to be enforced, applied nor considered.

Locker v. Am. Tobacco Co., 121 App. Div. 443, 458; 195 N. Y. 565.

And so in *Nat. Fireproofing Co. v. Mason Builders' Ass'n*, *supra*, a case like the one at bar, of which the Federal Court had jurisdiction by reason of diverse citizenship, the Circuit Court of Appeals for the Second Circuit said:

" * * * A person injured by a violation of the Federal act cannot sue for an injunction under it. The injunctive remedy is available to the government only. An individual can only sue for threefold damages" (169 F., 263).

The contention at p. 20 of our former brief was not that these decisions are correct, (which is not on this motion important), but that they should be considered in deciding whether the state courts could have reasonably rested their decision upon independent grounds of practice or common law right, which did not involve the Federal question set up in the assignments of error, and some of which involved no Federal question.

The whole discussion has become superfluous if we are right in saying that the brief of plaintiffs

in error shows that counsel did not present or intend to present to the Court of Appeals the Federal question set up in the assignments of error.

Passing from the motion to dismiss we make the following:

STATEMENT OF ARGUMENT AND POINTS ON WRIT OF ERROR.

The five assignments allege in different language the same error, namely: that the court erred in sustaining as against the Federal anti-trust act, the right, privilege or immunity claimed by the defendants under the copyright act.

Manifestly such an error might have arisen either from an erroneous construction of the copyright law or from not giving due weight to a claim of right made by the plaintiffs under the Federal anti-trust act.

As has been pointed out in our brief on the motion to dismiss, the construction of the copyright act was from the beginning to the end of the litigation in the state courts the chief subject of controversy and, so far as the appeal from the judgments was concerned, the sole matter passed upon and decided. The decision as to the effect of the copyright law cannot be re-examined, because it was in favor of the right, privilege and immunity claimed by the defendants under the copyright law; our contention in this regard, made at page 14 of our former brief, is conceded by the plaintiffs in error to be "unquestionably correct as a statement of the general rule." (*Brief of plaintiffs in error on motion to dismiss*, p. 26.) And no question raised by the assignments of

error is pointed out as an exception to the general rule.

The sole question in this Court, therefore, is whether the state court erred in deciding against a claim by the plaintiffs of a right, privilege or immunity under the Sherman Act. We have pointed out that the state appellate courts did not, in fact, consider such a claim, as appears from the opinions, and that the plaintiffs did not intend to present such a claim, as appears from their brief (*supra*, pp. 3-5). We have argued that no such claim was "specially" made in the trial court or, by adequate specification, presented to the appellate courts, (brief on motion, pp. 15-20) and that there is nothing in the case to excuse the lack of adequate specification (*supra*, pp. 6-9).

If, nevertheless, we assume that the plaintiffs in error made such a claim as is set up in the assignments of error, and further assume that the state courts decided against the claim, such a decision was not erroneous—first, because the state court was not bound to apply the Federal anti-trust statute in this case; second, because the plaintiffs have come into a court of equity with unclean hands and besides are seeking to maintain an action when it is manifest that they have suffered no actionable damage; third, because the Federal act to protect trade against unlawful monopolies clearly does not prohibit reasonable enjoyment of the copyright monopoly, and fourth, because the combination of the defendants was not unlawful under the Federal anti-trust act.

FIRST POINT.

The omission to apply the Federal Anti-Trust Act was not error.

a) because that act is not applicable in such an action as this when brought in a state court;

b) because the act is not applicable in an equity suit brought for an injunction unless the suit is brought by the Attorney General;

c) because the Federal and state anti-monopoly statutes cannot be applied to the same subject matter in the same action; and

d) because the complaint did not state facts sufficient to constitute a cause of action under the Federal anti-trust act or to show that the agreement or combination was in violation of that act.

A.

In an action sounding in tort brought in a state court and which does not solely relate to interstate commerce, the court is not bound to apply the Federal anti-trust act.

This act declares certain contracts illegal, and any one sued upon a contract may set up as a defense, that the contract is a violation of an act of Congress.

Bement v. Nat. Harrow Co., 186 U. S., 70.

But the defendants are not seeking to recover upon a contract.

The act also gives certain remedies in the United State Circuit Court to persons injured.

"It thus appears that the act specifies four modes in which effect may be given to its provisions. It is clear that the present suit does not belong to either of those classes. It is not a criminal proceeding (Sections 1, 2, 3) nor a suit in equity in the name of the United States to restrain violations of the Anti-Trust Act (Sec. 4), nor a proceeding in the name of the United States for the forfeiture of property being in the course of transportation (Sec. 6), nor an action by any person or corporation for the recovery of threefold damages for injury done to business or property by some other person or corporation" (Sections 7-8).

Minnesota v. Northern Securities Co., 194 U. S., 48, 68.

By Section 7 of the Sherman Act a person injured in his business or property may sue therefor "in any Circuit Court of the United States in the district in which the defendant resides or is found." And see Section 4.

Jurisdiction is given to the specified Federal courts and to no other court, the statute differing in this respect from those examined in

Second Employers Liability Cases, 223 U. S., 1, 56.

The New York courts had, therefore, no jurisdiction to give relief on the ground that the defendants violated the Sherman Act.

In *Bement v. National Harrow Co.*, 186 U. S. p. 87, it was assumed that a person injured in his person or property by acts violative of the Sherman Act, must sue in a Circuit Court of the United

States, in the district in which the defendant resides or is found; and it would seem to follow that a state court has no jurisdiction under the act.

Agreements creating a monopoly in restraint of trade and against public policy, though invalid and unenforceable, are not illegal in the sense of giving a right of action to third persons for an injury sustained, nor as affording ground for an injunction against threatened injury.

This was held in a suit closely resembling the suit at bar in which the United States Circuit Court for the Southern District of New York had jurisdiction by reason of diverse citizenship.

National Fireproofing Co. v. Mason Building Association, C. C. A., 169 F., 259.

Whether such a suit shall be sustained under the common law and the general law of New York, such as the suit at bar, (*Brief of plaintiffs in error on motion to dismiss*, pp. 21, 22) was a question for the New York courts to decide.

Penn. R. R. Co. vs. Hughes, 191 U. S. 477.

The law of New York relating to these actions is as follows:

“We may eliminate from consideration the statutes of the United States, referred to in the complaint, because they have no bearing upon the cause of action here presented. They relate only to matters in restraint of trade or commerce between or among the several States of the Union or with foreign nations, and for a violation of their provisions redress must be sought in the Federal courts, which alone have jurisdiction. The common

law, and the particular statute claimed to have been violated by the defendants, viz., chap. 690 of the Laws of 1899, commonly known as the Donnelly Act, control the determination of the question whether the acts alleged support the contention that they are illegal and in restraint of trade."

Locker v. American Tobacco Co., 121 App. Div. 443, 449—aff'd on opinion below, 195 N. Y. 565.

State of Missouri v. Associated Press, 51 L. R. A. 170.

No case has been found in which a state court has allowed a recovery based upon the Sherman Act or on account of its violation.

In Point I of their principal brief counsel for the plaintiffs in error cite to sustain the jurisdiction of this court only one authority—the case of *Straus v. American Publishers Association* in the Court of Appeals for the Second Circuit.

When Macy & Company filed their writ of error in this court they also prosecuted in the United States Circuit Court a suit against the same defendants to recover under the Sherman Act threefold damages for the same alleged trespass set up in the suit at bar. In the defendants' answer in the Circuit Court the judgment of the state court in the suit at bar was set up by way of *res judicata*; to this Macy & Company replied

"that the judgment in the State Court was not *res judicata* " " " because the present action was founded on the Federal statute under which the State Court had no jurisdiction " " " "

(Brief of plaintiff in error, p. 33.)

This view was taken by the Court, which said, speaking by Judge Ward,

"The fact that the judgment in the State Court depended upon the state statutes and that the complaint in this case is founded on the Federal statute *which is not within the jurisdiction of the State Court* makes no difference" (ibid p. 35).

Macy & Company having successfully asserted in the Circuit Court of Appeals that the state court in the suit at bar had *no* jurisdiction under the Sherman Act, now adduce this fact as persuasive that the state court had such jurisdiction! We submit that the decision of the Circuit Court of Appeals in *Straus v. American Publishers' Association* aids our contention, not only as an authority exactly in point, but also on the principles which underlie the law of estoppel and those which underlie the law of the thing adjudged.

B.

In a suit for an injunction not brought by the Attorney-General, there can be no recovery on the ground that a combination is illegal under the Federal anti-trust act.

It was so held when the Federal court had jurisdiction by reason of diverse citizenship.

"A person injured by a violation of the Federal act cannot sue for an injunction under it. The injunctive remedy is available to the government only. An individual can only sue for threefold damages."

Nat. Fireproofing Co. v. Mason Builders' Ass'n (C. C. A.), 169 F., 259, 263;

Pidcock v. Harrington, 64 F., 821;
Greer, Mills & Co., v. Stoller, 77 F. 1,
 and cases cited in our former brief pp. 20, 21.

C.

It was not error to refuse to apply the Sherman Act in a suit brought under the New York anti-trust act, in which an injunction had been granted.

If it be assumed that the American Publishers' Association was illegal under both the New York anti-trust statute and the Federal anti-trust statute and that the plaintiffs had a right to bring a suit in equity in the New York courts to enjoin the defendants because their agreement violated the Federal act, nevertheless the plaintiffs could not, with a complaint containing only one cause of action, assert their rights under both statutes, because these relate to different subject matter.

If we assume that the agreement violated both laws, the plaintiff might proceed under either and recover all the damages which he had sustained, but he was forced to elect.

Straus v. Am. Publishing Ass'n, C. C. A.
 brief of plaintiffs in Error, p. 35.

The Federal act could have no application to a monopoly in manufacture, production or sale within the State of New York of an article or commodity of common use or to the restraint of competition in the State of New York in the supply or price of such articles or to a restriction upon the free pursuit in the State of New York of the lawful business of selling books at retail.

U. S. v. Knight Co., 156 U. S., 1.

It was to these matters, wholly within the boundaries and the jurisdiction of New York that the agreement and combination were adjudged to relate. (Record, p. 138). The New York statute, on the other hand, is superseded so far as it covers the same field with the Federal act.

Second Employers Liability Cases, 223
U. S., 1, 55.

If the combination related to interstate commerce there was no cause of action for violation of the state law; if it related to intrastate commerce (as was adjudged) there was no cause of action for violation of the Federal law.

If the plaintiffs, alleging restraint of interstate commerce, had sought to give effect to the Sherman Act, they might have raised the question whether state courts, unlike the Federal courts, must, in a suit not brought by the Attorney-General, grant injunctions against combinations which violate the Sherman Act. But when, alleging acts within the State of New York restricting the free pursuit within that state of the lawful business of selling books at retail, plaintiffs sought to give effect at once to a statute which solely relates to interstate commerce and a statute which solely relates to commerce within the State of New York, they raised, at most, a question of practice, and the court under the inherent right to protect itself against confusion and incoherence, could say

“Whatever your rights under the Sherman Act may be, you cannot assert them in this action concurrently with rights under the Donnelly Act, which we are enforcing because you allege and

prove that the subject matter of your suit falls within the exclusive jurisdiction of the State of New York."

D.

The complaint contained no sufficient allegation of facts showing that the combination restrained interstate commerce, and therefore an omission to give effect to the Sherman Act was not erroneous.

It was alleged that the members of the Publishers' Association did business in different states. There is no sufficient allegation that the plaintiffs or any of the defendants were engaged in interstate commerce.

The allegation in the complaint relied on is as follows:

"Nineteenth.—That thereafter, and ever since May 1st, 1901, the defendants have unlawfully, and contrary to the declared policy of this State and its statutes, maintained such combination whereby competition in this State, as well as throughout all the States of the United States, in the supply and price of books, has been and is restrained or prevented, and whereby the free pursuit in this State of the lawful business of selling books has been and is restricted or prevented to the great injury and damage of these plaintiffs."

Record, p. 25.

The plaintiffs in error rely upon the words which we have italicized, but obviously, the whole nineteenth paragraph was framed to bring the case within the Donnelly Act and the italicized words are surplusage.

Troxell v. D., L. & W. R. Co., 185 F., 540.
541.

Counsel in their brief on the motion to dismiss, say, at page 7

“Any lack of specification in the complaint is fully cured by the findings of fact of the Trial Court and the propositions of law based thereon, presented by the plaintiffs in error and decided adversely to them, both by the trial courts and by the appellate courts.”

And at page 42 of the principal brief they make an assertion to like effect.

But findings of fact did not cure the defects in pleading, because a plaintiff can only recover *secundum allegata et probata*. The trial judge was not bound to hold that the agreement restrained interstate commerce under the Federal anti-trust act because that was not duly alleged. If, under the liberal power of amendment given by the New York Code of Civil Procedure, he might have amended the complaint so as to set up a claim under the Federal act, he was not bound to do so unless the plaintiffs moved for such amendment. No amendment was made and none was asked for. After judgment there was no power in any court to amend a pleading for the purpose of upsetting the decision and reversing the judgment. These familiar rules are enforced in the New York practice.

Leightson v. Claflin Co., 180 N. Y., 76,
81;

Northan v. Dutchess Co. Mat. Ins. Co.,
177 N. Y. 74;

- Trursdell v. Sarles*, 104 N. Y. 167;
Pope v. Terre Haute Car & Mfg. Co., 107
 N. Y., 61, 66.
Southwick v. First Natl. Bank of Mem-
phis, 84 N. Y. 420;
Freeman v. Grant, 132 N. Y. 22, 29;
Reed v. McConnell, 133 N. Y. 425, 434;
Bradt v. Krank, 164 N. Y. 515, 519.

The decision therefore rests upon grounds of state procedure, with which it is not the province of this Court to interfere.

- Western Union Tel. Co. v. Wilson*, 213
 U. S. 52, 54;
Kipley v. Illinois, 170 U. S. 182, 187, 188,
 189;
Layton v. Missouri, 187 U. S. 356;
Allen v. Alleghany Co., 196 U. S. 458, 465,
 466;
Tripp v. Santa Rosa Street Railroad Co.,
 144 U. S. 126.

SECOND POINT.

It was not error to dismiss the complaint as to copyrighted books because
(a) The plaintiffs have not come into a court of equity with clean hands, and
(b) It appears that the plaintiffs have suffered no actionable damage from the acts complained of.

A.

The plaintiff does not come into the court of equity with clean hands.

“A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty or righteous dealing. While in a proper case it acts upon the conscience of a defendant to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud or any unconscionable act in the transaction which forms the basis of his suit.”

Mich. Pipe Co. v. Fremont Ditch Pipe Line & R. Co., C. C. A. 111 F. 284, 287.
 1 *Pomeroy Equity Jurisprudence*, Sec. 404, 398.

Medicine Co. v. Wood, 108 U. S. 218, 227.
Comstock v. Johnson, 46 N. Y. 615.
Petridge v. Wells, 4 Abb. Pr. 144.
Toledo Computing Scale Co. v. Computing Scale Co., C. C. A. 142 F. 919.

This suit arises from the defendants' refusal to supply their copyrighted books to Macy & Company. It is not pretended that any defendant as an individual was bound by contract or otherwise to sell to Macy & Company. Their alleged rights rest solely upon the combination of the defendants. That combination was formed and continued, so far as Macy & Company were concerned, solely by reason of their course of dealing with the defendants' copyrighted books within the first year after publication. But for that course of dealing, the combination would never have affected Macy & Company. If that course of dealing ended the combination ceased to affect them.

Record, Findings 43 47, 33, pp. 124, 122,

Macy's course of dealing with the publishers' copyrighted books was the origin and basis of the controversy. It follows that if that course of dealing—the use made by Macy & Company of the defendants' copyrighted books within the first year after publication—was wanting in good faith, honesty or righteous dealing, if it was unconscionable, the maxim applies and the plaintiffs cannot maintain this suit in equity. Without repeating what is said elsewhere, it may be here pointed out that the use made by Macy & Company of new copyrighted books was monopolistic, injurious to the publishers and the booksellers and fraudulent as regards the public.

(a) The practice of Macy & Company is monopolistic.

They claim to sell all articles "at a lower figure than the same article can be obtained any

where else" and books in particular "at a cheaper price than at other retail book stores." (Record, pp. 15, 134.) As only one dealer can sell cheaper than all other dealers, this is equivalent to saying that they occupy the position sought by the monopolist of having overcome competition.

In effect it is asserted that Macy & Company have attempted to monopolize and have monopolized a part of trade or commerce.

To prove their assertion they sell current magazines and new copyrighted books cheaper than any other dealer and, if necessary to meet competition, at less than the wholesale price at which they purchase (p. 134). That is to say, they use their

"power to crush existing and threatened competition by so slaughtering prices for a time as to ruin all who are not parties to the combination."

1 Eddy on Combinations, Sec. 329.

This shows

"an attempt and purpose to suppress a competitor by underselling him at a price so unprofitable as to drive him out of business,"

which is a "badge of monopoly."

Message of the President to Congress,
Dec. 5, 1911.

(b) Such dealings even by a producer selling goods of his own manufacture may be "a badge of monopoly," but Macy & Company dealt, not with books of their own manufacture, but with books manufactured by the defendants, and the

result not only tended to monopoly, but was injurious both to the publishers and their customers, the booksellers.

This appears from the record, (*Finding* 92, p. 133) from the unanimous desire of publishers and dealers to establish a fixed price system and from the allegations of the complaint (*Twelfth to Fourteenth, Sixteenth, Twenty-third*, pp. 16, 17, 21), and it appears from all the facts found relating to the trade of Macy & Company. A bookseller cannot compete in the sale of magazines or new copyrighted books with a dealer who sells them at less than cost. The publisher loses by the narrowing of his market, by the difficulty of selling to the trade books which Macy & Company advertise at prices with which dealers cannot compete and by the injury to his own retail business.

As was said by Judge Edward T. Bartlett in this case:

"The result is a large number of the retail dealers in the various kinds of articles thus undersold are driven out of business, many of them at a time of life when they are unable to reinstate themselves in some other calling.

It also results in great damage to manufacturers, producers and wholesale dealers who have been driven into insolvency.

It is, of course, true that the proprietors of department stores have the legal right to offer to the public goods of any kind at prices below production, or indeed, may donate them to their customers.

It is, however, equally true that the manufacturers, producers and wholesale dealers may say to the men whose policy is thus carrying ruin and destruction to their business

and that of their customers, that if you persist in this disastrous cutting of rates we will sever all business connections absolutely. These are mutual and inherent rights, in the nature of things, so long as self-defense and the privilege to exist survive among men."

Straus v. Am. Pub. Assn., 177 N. Y., 473.

This dissenting opinion was rendered upon demurrer to the complaint when the facts as to the plaintiffs' dealings had not yet been proved, and these dealings were not considered in the opinion of Parker, *C. J.* If the defendants had appealed from the final judgment as to uncopyrighted books they might well have succeeded on this ground, and they can now rely upon it for affirmance as to copyrighted books under the rule laid down in the opinion of the court in *Park Sons Co. v. National Druggists' Assn.*

"I am not here going to question the right of the big fish to eat up the little fish, the big storekeeper to undersell and drive out of business the little storekeeper, but I do believe that the little fellows have the right to protect their lives and their business, and if they can by force of argument and persuasion induce manufacturers to establish a uniform price for fixed quantities, so that they can purchase as cheaply as the great merchants, and thus compete with them in the retail trade, they have the right to do so, and that no court of equity ought to interfere and restrain them from the exercise of this privilege."

Park & Sons Co. v. Nat. Druggists' Assn., 175 N. Y., 1, 14.

This is the rule of law laid down by the New York Court of Appeals and therefore controlling in this suit brought in a New York court.

(c) The dealings of Macy & Company with copyrighted books were also a fraud on the public.

All the copies of an edition of a newly published copyrighted book are equivalent, and so are all the copies of a current magazine.

A copy bought at Macy's is just as desirable and valuable as a copy bought elsewhere. Hence, if Macy & Co. undersell all competitors in magazines of the current month, and new copyrighted books, they establish beyond cavil a standard of cheapness. To accomplish this they advertise and sell these articles at lower prices than others receive, and they make such sales even if the dealings are wholly unprofitable. These bargains are not of remnants or shop-worn or unseasonable articles or goods which for any reason have been marked down in price, but they are in new goods bought from month to month or day to day for the express purpose of being sold at less than cost. This practice, so foreign to ordinary commercial usage, continues because "Books are merely a peg on which to hang a general story"—the false story that other articles are sold more cheaply than books.

This false story is told in many forms. This is one of them:

"Read this Everybody.

Competitors, when continually undersold, indulge in unfair and absurd claims. The readiest subterfuge is an attempt to disparage our qualities. When confronted with the

fact that our prices are lower than theirs, they invariably try to explain the beat by attacking the character of our goods. How about Books? We use them to illustrate because you *know* books. They silence criticism. Our rates range from 10 cents to \$1.50 less than others ask for the same books. We save you much more on other lines."

Record, p. 135.

Before these facts came into the case Judge Edward L. Bartlett wrote:

"As an illustration, a dry goods establishment, engaged in selling a vast number of articles legitimately related to its business, concludes, in order to promote its principal trade, to offer for sale books, furniture, druggists' sundries and numerous other articles that need not be mentioned, at cut prices, representing only the cost of production and oftentimes far below it. The inevitable effect of this policy is to draw a large number of people to these establishments, and in the final result the dealer makes good his losses in the outside trade by the prices he obtains in his legitimate business.

It may be fairly assumed that the general business is conducted at a profit."

177 N. Y., 493.

The purpose of this action is to compel the publishers to allow their new copyrighted books to be sold by Macy & Co. to the public at less than cost as a basis for advertising as follows:

"on other lines—the ones more difficult for inexperienced persons to judge of qualities—

the price differences in our favor are much greater."

Record, p. 134.

In trade mark cases it is held that

"the plaintiff should not in his trade mark, or in his advertisements or business, be himself guilty of any false or misleading representation; that if the plaintiff makes any material false statement in connection with the property which he seeks to protect he loses the right to claim the assistance of a court of equity."

Worden v. California Fig Syrup Co.,
187 U. S., 516, 528, 530.

"Those who come into a court of equity seeking equity must come with pure hands and a pure conscience. If they claim relief against the fraud of others, they must be free themselves from the imputation.

If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that by the fraudulent rivalry of others their own fraudulent profits are diminished" (Duer, J.).

Petridge v. Wells, 13 How. Pr., 388.

It is set up as a defense that the plaintiffs cannot maintain this action in equity (p. 36), but the defense is available even if not pleaded.

Uri v. Hirsch, 123 F., 568, 578.

B.

The plaintiffs were not damaged by the defendants' acts.

The damage is the cause of action and the combination mere matter of aggravation.

Verplanck v. Van Buren, 76 N. Y., 247, 259, 260.

"Only actual damages, established by proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable."

Central Coal & Coke Co. v. Hartman, C. C. A., 111 F., 96.

There must be pecuniary loss.

The Conqueror, 166 U. S., 110.

"By consequences which the plaintiff, acting as prudent men generally do, can avoid, he is not legally damaged. Such consequences can hardly be the direct or natural consequence of the defendants' wrong, since it is at the plaintiff's option to suffer them."

Sedgwick on Damages, Sec. 202.

The controversy between Macy & Co. and the publishers was whether the plaintiffs should make an ordinary profit or a profit smaller than is usual in the trade. The defendants wished the plaintiffs to make a profit by selling at the market price. The plaintiffs preferred to make a smaller profit, or a loss, by selling at a lower price than any other dealer.

Macy & Co. could at all times have purchased the defendants' copyrighted books on the most

favorable terms to sell at market prices. *Finding 33, Record*, p. 122, 45, 46, 47, p. 124.

By so doing they would have increased their profits. To obtain books from the defendants they were not obliged to make any unlawful agreement or to join any association; indeed, they were not eligible to membership in the American Publishers' Association. The only condition imposed was that in selling defendants' copyrighted books they should for one year after publication make a larger profit than they were accustomed to make, being the profit universally made by retail dealers. The acts of the defendants did not, therefore, cause pecuniary loss to the plaintiffs, and, if wrongful, at most constituted *injuria sine damno*.

If the plaintiffs sustained loss it was a consequence of their own wilful act. This more fully appears from the specific findings made by the Court to show the nature of plaintiffs' dealings in copyrighted books. The plaintiffs, for twenty-two years, sold the defendants' magazines so much below the market price that the actual loss, in addition to expenses of sale, was three cents on each copy. *Record*, p. 134.

Obviously the plaintiffs suffered no legal damage from the interruption of this business, but, on the contrary, received pecuniary advantage.

Authors & Newspaper Assn. v. O'Gorman Co., 147 F., 616, 621.

So the plaintiffs to meet competition sold new copyrighted books at retail at less than the wholesale price which they paid therefor. *Record*, p.

134. Obviously the plaintiffs were pecuniarily benefitted by the prevention of such dealings.

The typical transaction and the one which caused the defendants to refuse to make further sales to the plaintiffs is shown in Findings 43-47, at page 124. The copyrighted book "*Tarry Thou Till I Come*" was published by the Funk & Wagnals Company to be sold at retail at the net price of \$1.40. The plaintiffs sold it at \$1.24, and refused a request to sell it at \$1.40. It is not suggested that they would have met with any difficulty in selling at the net price. They preferred to sell at a price lower than the market price which they could obtain as all other dealers did. They refused to take the books unless they could sell at 16 cents per volume less than the market price. The purpose and the natural effect of the defendants' act was to increase the plaintiffs' profit. The plaintiffs could suffer loss only by wilful refusal to deal with the defendants on the terms offered by them. Even if the defendants' act was wrongful the plaintiffs thereby suffered no pecuniary damage.

There is no allegation or proof of special damage and by the general rules of law a refusal to sell goods except upon terms which increase the vendee's profit is not actionable. A plaintiff cannot recover for losses prevented or gains increased. Courts give no remedies for self-imposed injuries. The suitor to whom compensation is awarded for injury to business is the normal man, who trades to make profit and avoid loss; who sells for the best price obtainable; who conducts his business according to the rules which

commonly prevail among prudent people. A man cannot recover in tort for injury resulting from "his abnormal and peculiar mode of doing his business."

1 Sedgwick on Damages, Sec. 143.

Even if the defendants had broken a contract to furnish the books, the plaintiffs could not recover damages caused by their refusal to accept the goods when offered on reasonable conditions—and conditions willingly observed by the whole trade are presumptively reasonable.

Warren v. Stoddart, 105 U. S., 224;

Parsons v. Sutton, 66 N. Y., 92;

Lawrence v. Porter, 63 F., 62;

Hamilton v. McPherson, 28 N. Y., 72, 76, 77;

Rochester Lantern Co. v. Stiles & Parker Press Co., 135 N. Y., 209, 217;

Brown v. Weir, 95 App. Div., 78;

Milton v. Hudson River Steamboat Co., 37 N. Y., 210, 214, 215;

Ashley v. Rocky Mountain Bell Tel. Co., 25 Mont., 286;

L. & N. R. Co. v. Sullivan Timber Co., 138 Ala., 379;

Scherrer v. Baltzer, 84 Ill. App., 126;

French v. Vining, 102 Mass., 132;

Rudell v. Grand Rapids Cold Storage Co., 136 Mich., 528;

Vencell v. O. & K. C. R. Co., 132 Mo. App., 722;

Dobbins v. Duquid, 65 Ill., 464.

If, under *Hadley v. Baxendale*, a vendee's notice of the use which he intends for the goods binds the vendor, it must equally bind the vendee himself. If a bookseller asks for "*Tarry Thou Till I Come*," to be offered for sale by him at a certain profit, and the publisher tenders the book on the same terms on which it is offered to all other such dealers, which will give the bookseller a profit on each book greater by sixteen cents, the bookseller suffers no pecuniary injury. He must accept the offer or forego his action against the vendor for damages.

"Of course he was not obliged to buy that stock, but the opportunity to buy it served to fix and limit the damage he suffered by reason of defendant's refusal to deliver."

Joseph v. Sulzberger, 136 App. Div., 499, 508.

There is here no claim or suggestion of special damage.

"The law, in confining the compensation to the pecuniary loss, does not run along the lines of the imaginary and the possible, but rather along the lines of the actual and the probable, and therefore the reasonable expectation must be made to appear by the evidence. Conjecture, speculation and fancy cannot supply the absence of evidence or avoid the effect of evidence which is presented."

Swift & Co. v Johnson, C. C. A., 138 F., 867, 873.

THIRD POINT.

Notwithstanding the Federal anti-trust act it is lawful for a publisher when selling, at wholesale, books copyrighted by him, to fix, by agreement with the purchasing bookseller, the retail price at which such copyrighted books shall be sold during a period of one year.

The rules of the American Publishers' Association here in question which were in force at the time of filing the answers were as follows:

"I.—That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore; provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also at the desire of the individual publisher, any new edition, any work of fiction or any juvenile.

"II.—It is recommended that the retail price of a net book, marked NET, be printed on a paper wrapper covering the book.

"III.—That the members of the Association agree that copyrighted books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those

booksellers and jobbers only who will sell their copyrighted books, except at retail, to no one who cuts such net prices" (pp. 39, 40, 41, 66, 67, 119).

Rule IV provided that works of fiction might be sold at retail for a discount not exceeding 28 per cent. from the fixed price. This is a mere modification of the net price rule and does not require separate discussion.

Without doubt a patentee may, when selling his patented article, impose by agreement with the vendee a restriction as to the price at which the article may be thereafter sold.

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions, which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal. * * *

"But that statute [the Sherman Act] clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. * * *

"The owner of a patented article can, of

course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

Bement v. Nat. Harrow Co., 186 U. S., 70, 91, 92, 93.

See also:

Henry v. Dick Co., 224 U. S., 1, 31, 39, 43, 44, 45, 46, 47.

Victor Talking Mach. Co. v. The Fair, 123 F., 424, 61 C. C. A., 58;

Nat. Phonograph Co. v. Schlegel, 128 F., 733, 735, C. C. A.;

Robinson on Patents, Sec. 824;

Edison Phonograph Co. v. Kaufmann, 105 F., 960;

Park & Sons v. Hartmann, C. C. A., 153 F., 24;

Edison Phonograph Co. v. Pike, 116 F., 863;

and cases cited at page 38, 224 United States Reports.

The rule applies also in copyright cases.

In the case at bar Chief Judge Parker, speaking for the New York Court of Appeals, quoted the sentence first above copied from *Bement v. National Harrow Co.*, and continued:

"That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the Association and agreement attached in this action" (*Straus v. Am. Pub.*

Asso., 177 N. Y., 473, 477; opinion of Gray, *J.*, 488, 489; opinion of Gray, *J.*, speaking for the court on the second appeal; *Record*, p. 184).

Patents and copyrights exist under the constitutional provision which empowers Congress

"To promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Constitution, Art. I, Sec. 8, Sub. 8.

Congress, by Title LX. of the Revised Statutes, (in force when the judgment herein was entered) protected these allied rights by similar statutes, which, in regard to the point now in question, employ almost the same words.

A patent gives the "exclusive right to make, use and vend the invention." (Section 4884.) A copyright gives the "sole liberty of printing, . . . publishing . . . and vending" the copyrighted article. (Section 4952.)

The monopoly of making and vending the patented article and the monopoly of printing and vending the copyrighted article are given in equivalent language and by ordinary rules of interpretation are equivalent.

It is only in the "field of use" that the monopolies differ. The patentee has the exclusive right to . . . use . . . the invention.

The copyright owner has the

"sole liberty of . . . publishing, completing, copying, executing, finishing . . . the book, map, chart, etc., and in the case of a dramatic composition, of publicly performing it or

causing it to be performed or represented by others; and authors or their assigns shall have exclusive right to dramatize and translate any of their books for which copyright shall have been obtained under the laws of the United States."

R. S., Sec. 4952.

"Each and all of these statutory rights should be given such protection as the act of Congress requires, in order to secure the rights conferred upon authors and others entitled to the benefit of the act."

Bobbs-Merrill Co. v. Straus, 210 U. S., 339, 348.

The patent law gives a complete monopoly and the copyright law a partial monopoly of the "field of use." A reason for this distinction is that copyright is given only on condition that there is publication of the copyrighted article. Publication gives to the public a right to make certain uses of the book and the monopoly in the "field of use" conferred by the copyright can, at most, extend to what is left after the rights of the public gained by publication are protected.

"Restrictions imposed upon the use prior to publication protect the copyright. Such restrictions imposed after publication cannot affect the public rights acquired by publication. * * * The same distinctions are observed and the same rules applied in the cases where statutory copyright has been obtained."

Werckmeister v. Am. Lith. Co., C. C. A., 134 F., 321.

Publication of a book implies the distribution of copies. The owner of a copy has the unrestricted right to read it, sell it, bind and rebind it (*Kipling v. Putnam*, 120 *Fed. Rep.*, 634, *C. C. A.*) and also a right to make use of its contents for purposes of criticism, quotation and the preparation of other works; this latter right not being unlimited, but restricted and defined by the decisions of the courts concerning the "fair use" of copyrighted books.

"The sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending," is in short the sole right to multiply and vend.

Henry v. Dick Co., 224 U. S., 1, 46.

The right to dramatize a work, or publicly to perform a play or musical composition is a right to use. The right to translate, to make extracts, to copy for purposes of criticism or in the preparation of another work is in a sense a right to multiply copies, but it may also be considered a right to use.

The word "use" is frequently employed in the act in force July 1, 1909,

Copyright Law, §§1 (c), 2, 6, 7, 25 (c), 31 (proviso).

Most copyright litigation relates to the field of use.

"In the law of copyright, piracy is the use of literary property in violation of the rights of the owner. The meaning of infringement is the same."

Drone on Copyright, 383.

Certain uses of the copyrighted book are held to be lawful. All other use is within the exclusive control of the owner of the copyright.

The line between "fair" and "unfair" use—the use permitted by the act of publication, and the use reserved in spite of publication—has been drawn in many cases in connection with different subjects, such as Criticism, Quotation, History, Biography, Abridgments, Translation, Dramatization, Treatises, Directories, Dictionaries, Catalogues.

Drone on Copyright, 387-399, 433, 467.

The cases show that in the field of use, as in the broader field of use under the patent law, the owner of a copyright may farm out such part as he pleases and may retain the remainder, and contracts making such division are lawful.

"The same rule should be applied to a copyright as to a patent for a machine."

Story v. Holcombe, 4 McLean, 306;

The courts have followed the patent cases whenever applicable.

Macgillivray on Copyright, 281, 282;

Callaghan v. Myers, 128 U. S., 617;

Reed v. Holliday, 19 Fed. Rep., 325;

List Pub. Co. v. Keller, 30 Fed., 772;

Gilmore v. Anderson, 38 Fed., 846;

Harper Bros. v. Donohue, 144 Fed., 491, 492;

West Pub. Co. v. Lawyers' Co-op. Pub. Co., 64 Fed., 360;

Harper v. Ranous, 67 Fed., 904;

Daly v. Webster, 56 Fed., 483, 488, C. C. A.;

Ogilvie v. Merriam Co., 149 Fed., 858, 862;

Doan v. Am. Book Co., C. C. A., 105 Fed., 772, foot of 776.

The differences between the copyright act and the patent law are, however, found solely in what in patent law is the field of use. In the field of making and the field of sale the statutory provisions are the same, and hence the right of vending is the same under both statutes.

The owner of the copyright may make a valid contract with his publishers as to the selling price of copies of the copyrighted article.

Drone on Copyright, 365;

Murphy v. Christian Press Assn., 38 App. Div., 426, 430.

It was said by Judge Clifford in *Parton v. Prang* (3 Cliff., 537):

"Personal property is transferable by sale and delivery, and there is no distinction in that respect, independent of statute, between literary property and property of any other description. * * * Sales may be absolute or conditional, and they may be with or without qualifications, limitations and restrictions, and the rules of law applicable in such cases to other personal property must be applied in determining the real character of a sale of literary property."

And see

Hudson v. Patten, 1 Root (Conn.), 133;

Aronson v. Baker, 43 N. J. Eq., 365, 369;
Park v. Nat. Wholesale Druggists' Assn.,
 175 N. Y., 1, 19.

This case, with *Straus v. American Publishers' Association*, 177 N. Y., 473, are discussed in *John D. Park & Sons v. Hartman*, 153 Fed., 24, 35, 36.

Judge (now Mr. Justice) Lurton, speaking for the Circuit Court of Appeals, said:

"There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute, and the rights secured to an inventor under the patent statutes, that the cases which relate to the one statute are not altogether controlling as to the other" (see *Bobbs-Merrill Co. v. Straus* (C. C. A.), 147 Fed., 15, 23).

"Nevertheless the statutory right to exclusively publish and vend copies of a copyrighted production would seem to take direct contracts between the publisher and his vendees in respect to the price at which subsequent sales shall be made outside of the rule as to restraints of trade which might otherwise apply." (Citing *Murphy v. Christian Press Assn.*, supra.)

The headnote is in part as follows:

"The exemption from the common-law rule against monopoly and restraint of trade, and the provisions of the federal anti-trust act of July 2, 1890 (26 Stat., 209, c. 647), which has been extended to contracts affecting the sale and re-sale, the use or the price of articles made under a patent, or productions covered by a copyright, does not extend also to

articles made under a secret process or medicine compounded under a private formula" (153 Fed., 24).

The words which we have italicized are exactly in point in the case at bar. If the law was so stated, notwithstanding the decision of the Circuit Court of Appeals in the *Bobbs-Merrill* case, the statement more plainly is the law, in view of the decision of this Court in that case, holding that copyright is a sole right to vend, as well as a right to multiply copies.

That an owner of copyright is not, on the sale of a copyrighted article, necessarily divested of all his statutory rights in regard to it, but only of such rights as he conveys, appears from

Cooper v. Stephens (1895), 1 Ch., 567;
Marshall & Co., Ltd., v. Bull, Ltd., 85
 Law Times Rep. 77, 82;
Patterson v. Ogilvie, 119 Fed., 453;
Sterens v. Gladding, 17 How., 447.

In the case at bar in the New York Court of Appeals on the second appeal Judge Willard Bartlett delivered a dissenting opinion, in which two judges concurred. They voted, on the authority of *Bobbs-Merrill Co. v. Straus*, 210 U. S., 339, to reverse the decision of the Court of Appeals theretofore made.

Judge Bartlett said:

"The fair import of the decision is that the owner of a copyright obtains nothing as such under the Federal law but the exclusive right to publish and multiply copies of the protected work and vend the same. When he

sells copies, the contracts of sale are unaffected by the copyright statutes, but are subject to the same rules of law as those which apply to contracts for the sale of other personal property."

Record, p. 188.

We respectfully submit that the learned judge misapprehended the effect of the decision which he cited. In the *Bobbs-Merrill* case this Court carefully limited the decision to the facts, saying:

"In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice in the book undertaking to restrict the retail sales to a price of one dollar a copy.

The precise question therefore in this case is, does the sole right to vend (named in §4952) secure to the owner of the copyright, the right after a sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum. We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. *There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sale of the book*" (p. 350).

The Court also said (at page 345):

"We may say in passing, disclaiming any intention to indicate our views as to what would be the rights of parties in circumstances similar to the present case under the patent laws, that there are differences between the patent and copyright statutes in the extent of the protection granted by them. * * *

The learned counsel for the appellant in this case in the argument at bar *disclaims relief because of any contract*, and relies solely upon the copyright statutes and rights therein conferred. The copyright statutes ought to be reasonably construed with a view to effecting the purpose intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor to be narrowly construed as to deprive those entitled to the benefit of the rights Congress intended to grant." (Italics ours.)

It appears on the face of the opinion

1. That the question of the validity of a contract between the copyright owner and the vendee of the copyrighted article **was not passed upon.**

2. That the authority of patent decisions in copyright cases where the circumstances are similar and the applicable statutory provisions are equivalent **was not questioned.**

3. That the authority of *Bement v. National Harrow Co.*, 186 U. S., 70, was not shaken. Of this case Mr. Justice Day, speaking for the Court, says:

"In *Bement v. National Harrow Co.*, 186 U. S., 70, the suit was between the owners of the letters patent as licensor and licensees seeking to enforce a contract as to the price and terms on which the patented article might be dealt with by the licensee.

The case did not involve facts such as in the case now before us, and concerned a contract of license sued upon in the state court, and, of course, does not dispose of the question before us" (210 U. S., 345).

The case at bar is distinguishable from the *Bobbs-Merrill Case* on precisely the same grounds as the *Bement Case*, and the language of Mr. Justice Day, in regard to the distinction, may be paraphrased as follows:

In the case at bar the question is as to the validity of a contract between the owner of a copyright and his vendee or licensee as to the price and terms on which the copyrighted article might be dealt with by the vendee. The case does not involve facts such as in the *Bobbs-Merrill Case* and concerns a contract of sale or license brought in question in the state court, and, of course, is not disposed of by the decision in the *Bobbs-Merrill Case*.

Bement v. National Harrow Co., and *Henry v. Dick Co.* show that when a patentee sells subject to conditions a patented article, the contracts of sale are affected by the patent statutes and are not affected by anti-monopoly laws as are contracts for the sale of other personal property. *Bobbs-Merrill Co. v. Straus* does not hold or imply that this rule does not extend to contracts of sale made by a copyright owner with his vendee.

These views are sustained by *Dr. Miles Medical Co. v. Park Sons & Co.*, 220 U. S., 373, 405, and by the discussion of the *Bobbs-Merrill Case* in *Henry v. Dick Co.*, 224 U. S., 1, 43-47.

That was a case relating to the use of a patented article. Mr. Justice Lurton pointed out the exact scope of the *Bobbs-Merrill Case* and the difference between the copyright and patent statutes in regard to the field of use and said:

"There is no collision whatever between the decision in the *Bobbs-Merrill Case* and the present opinion. Each rests upon a construction of the applicable statute and the special facts of the cases" (p. 47).

There is resemblance between the "exclusive right to * * * vend" a patented article and the "sole liberty * * * of vending" a copyrighted article. No difference between a patented article and a copyrighted article is pointed out in the *Bobbs-Merrill Case* or has been suggested in this case which tends to prevent the principle of the *Bement Case* and the *Dick Case* from being applied to the case at bar.

Judge Willard Bartlett in his dissenting opinion (*Record*, pp. 187, 193 N. Y., 496, 499) says:

"On the other hand, Mr. Justice Day, writing for the Supreme Court of the United States in the *Bobbs-Merrill case*, expressly declares that there are differences between the patent and copyright statutes in the extent of the protection granted by them, and cites with approval an opinion by Circuit Court Judge Lurton, in which he said that these differences are so wide 'that the cases

which relate to the one subject are not controlling as to the other' " (210 U. S., on p. 246).

What Mr. Justice Day cited from the opinion of Circuit Judge Lurton was:

"that the cases which relate to the one subject are not altogether controlling as to the other."

The omission of the word "altogether" essentially changes the meaning of the passage. If decisions in patent cases are not controlling in copyright law it might well be argued that the Court of Appeals erred in following the *Bement Case*.

Judge Bartlett quotes from *Murphy v. Christian Press Ass. Pub. Co.*, 38 App. Div., 430, as follows:

"We suppose that the author of a new geometry may fix the price at which he will sell his work at any time, or arrange with others for its publication and sale at the stipulated price. But if all the publishers of books on geometry were to combine and agree not to sell any publication on that subject, except for a stipulated price, the contract would be in restraint of trade, and void."

The members of the American Publishers' Association did not agree not to sell books on geometry or books on any subject except for a stipulated price. Neither the Association nor any member of it had anything to do with fixing the price of any book except that each member fixed the price

of his own books. Competition between publishers was in no way affected by the existence of the Association. Each publisher agreed that he would fix a price upon his own book and arrange with others for its publication and sale at the stipulated price. That is, he agreed that he would make as to each of his books a lawful agreement.

FOURTH POINT.

The agreement of the American Publishers' Association was not in violation of the Sherman Act.

It has been argued that each publisher had a right to put a retail net price upon each copyrighted book published by him; that he had a right to mark this net price upon the paper wrapper; and that he had also a right to sell his copyrighted books to those booksellers only who would maintain the retail price of such book for one year and to those booksellers and jobbers only who would sell their copyrighted books except at retail to no one who cuts such net prices.

We shall now argue that each publisher could agree with other publishers that he would conduct his own business according to this method which as an individual he could lawfully pursue.

It is to be noted that the question has not heretofore been considered by any judge or argued by counsel in this case. The question comes before this Court in first instance as well as in last resort.

It may be admitted that all publishers could not

lawfully agree to fix a price upon all their copyrighted books on geometry or on any other subject.

Murphy v. Christian Press Assn., 38 App. Div., 426.

It may also be admitted that the publishers could not enter into a combination for the purpose of restricting output and destroying competition, or refusing to sell their product to jobbers except at a price fixed not by trade and competitive conditions, but by the decision of a committee.

Standard Sanitary Mfg. Co. v. U. S., 226 U. S., 20.

C. C. A., 191 Fed., 172.

On the other hand we claim that all or any of the publishers might make rules for regulating the conduct of their business among themselves and with the public, and providing for just and fair dealings among them, provided the regulations were made for the legitimate purpose of reasonably forwarding personal interest and developing trade, without intent to wrong the general public or limit the right of individuals, or restrain the free flow of commerce, or bring about the evils, such as enhancement of prices, which are considered to be against public policy.

Anderson v. United States, 171 U. S., 604.

Hopkins v. United States, 171 U. S., 578.

Standard Oil Co. v. United States, 221 U. S., 1, 58.

Straus v. American Publishers Association, 177 N. Y., 473, 477, 488, 489, 490, 491.

Park & Sons Co. v. Nat. Druggists Assn.,
175 N. Y., 1.

That some regulation was necessary of the publishing trade as it existed before the formation of the American Publishers' Association appears from the complaint:

“Twelfth.—That throughout the said period the publishers, who also sold and still sell at retail, and retail dealers were accustomed to advertise and offer the sale of books at retail at certain prices called ‘list prices’ and to deceive the public or those who were not acquainted with the wiles and customs of the trade, to induce them to believe that said ‘list prices’ were the ordinary retail prices of such books, whereas, in fact, both the publishers and the dealers only obtained such ‘list prices’ at retail from the ignorant and unwary, but gave large and liberal discounts from said prices at retail to anyone who inquired, or was familiar with the customs of the trade.

“Thirteenth.—By reason of such deception and lack of uniformity in the price of the same book, the purchasing public lost confidence in the publishers who sold at retail, and in the dealers, and gave their custom to such dealers in books, amongst others, to these plaintiffs, as had established fixed prices, and where they were assured that the greed of the dealer would not attempt to secure an extortionate profit or charge different persons different prices for the same book.

“Fourteenth.—That by reason of the foregoing facts the publishers of books who sold their own and other publishers' books at re-

tail, and a large number of dealers found their business and their profits decreasing."

Complaint, pp. 16, 17.

It thus appears by the plaintiffs' own statement that by reason of "lack of uniformity in the price of the same book" and the fact that dealers could "charge different persons different prices for the same book" the business of publishers and dealers was diminishing and the public was deceived and lost confidence in the trade. It is true that this condition of things gave an advantage to the owners of department stores who wished to sell books at less than a living profit, as an advertisement for their other goods, but this advantage was at the expense of the trade.

"Retail booksellers throughout the country were injuriously affected by the competition of department stores and mail order houses."

Finding 92, p. 133.

It was, therefore, apparent in the year 1900, that, in the interest of the public and of all publishers, and of dealers and booksellers who sold books for profit, it would be advantageous to adopt a trade rule prohibiting "lack of uniformity in the price of the same book" and providing that dealers should not "charge different persons different prices for the same book."

Each publisher of copyrighted books could, by agreement with the bookseller to whom he sold, lawfully fix the retail price at which that bookseller should dispose of such copyrighted books. If all publishers should do this the abuses set forth in the complaint would be prevented.

This was the origin of the American Publishers' Association. Its members, for the benefit of the public, and of all publishers and booksellers, and for their own benefit, agreed that under the powers given to them under the copyright law they would each fix a retail price upon their copyrighted books for a period of one year after publication. Regulating trade is not restraining trade.

U. S. v. Reardon, 191 F., 454, 458.

Fonotipia L't'd v. Bradley, 171 F., 951, 959.

Heim v. N. Y. Exchange, 64 Misc., 529, 531.

Am. Live Stock Com. Co. v. Chicago Live Stock Exchange, 143 Ill., 210.

The rule complained of was an admirable specimen of legitimate trade regulation. It was devised to prevent a recognized evil which affected the whole trade and was injurious to the public. The rule did not go beyond the evil which it was planned to redress. It called upon no member to do any act which he could not lawfully perform and it had none of those incidents which sometimes make action by a combination unlawful, even when every member of the combination might individually take it.

According to the complaint ninety-five per cent. of the publishers and ninety per cent. of the booksellers in the United States approved the rule (pp. 11, 13). No one except Macy & Company is alleged to have opposed it. It does not appear that the public has in any way been injured by the existence of the American Publishers Association. A trade rule approved by all engaged in a trade is presumptively fair and reasonable.

The rules and the agreement in no way restrained the competition which had existed between the publishers. There was no limitation of output or fixing of prices by any common action. Each publisher continued to carry on his business in unrestricted competition with all others. There was no restraint of competition between jobbers, there was no attempt to obtain for the members of the Association any monopoly. Every publisher could become a member of the Association. Members of the Association were left free to deal under the rules with any publisher and with any jobber or bookseller. The general flow of commerce was not interrupted.

The desire of a vendor to vend the articles in which he deals on equal terms to all purchasers is not immoral. The establishment of a fixed price, —a price equal to all purchasers—is a forward step in the evolution of commerce and is imposed by legislation whenever possible.

Railroad companies are not allowed to fix their rates by agreement with each other, but they are by law compelled to charge the same rate for the same service without discount or rebate to anyone. The publishers voluntarily regulated the book trade to the same purpose (although to a far less extent) that the legislature has regulated the trade of common carriers. In each case the incidental restraint was to the advantage of the public.

The case at bar is distinguishable from *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, because the commodity there in question, unlike a copyrighted book, was "not entitled to special privilege or immunity" (p. 408). It was said (p. 402):

[The complainants'] "case lies outside the policy of the patent law, and the extent of the right which that law secures is not here involved or determined."

But if we leave out of consideration the privilege and immunity given by the copyright law, there remain distinctions which would validate the agreement of the American Publishers' Association on the facts of this case, under the rules laid down in *Dr. Miles Medical Co. v. Park & Sons Co.* The Court, speaking by Mr. Justice Hughes, there said:

" 'The true view at the present time,' said Lord Macnaghton in *Nordenfelt v. Maxim-Nordenfelt & Co.*, 1904 A. C., p. 565, 'I think is this: The public have an interest in every person carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public.' • • •

"But agreements or combinations between

dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer."

Dr. Miles Med. Co. v. Park & Sons, 220 U. S., 406, 407, 408.

The rule of the American Publishers Association was "reasonable in reference to the interests of the parties concerned," as is shown by the plaintiffs' allegation that ninety-five per cent. of all publishers, and ninety per cent. of all booksellers favor the rule. No publisher and no dealer except the plaintiff is shown to oppose it. The rule is "reasonable with reference to the interests of the public" because there is no proof of any increase of prices or other injury to the public and on the contrary the complainant alleges that the absence of fixed prices was used to deceive the public and that by reason "of such deception and lack of uniformity in the price of the same book, the purchasing public lost confidence and withdrew their patronage."

Record, pp. 16, 17.

The rule did not have for its "sole purpose the destruction of competition and the fixing of prices." The competition among publishers in output and price was wholly unrestrained. Each retail dealer would be restrained from competing as to the retail price of any particular copyrighted book, but he could sell any other copyrighted book at its price or any uncopyrighted

book at any price. The rule was directed not at the competition of ordinary dealers, but at the illegitimate competition of Macy & Co. The rule was "so framed and so guarded" as to forbid the "lack of uniformity in the price of the same book" which both parties admit to be injurious to the trade and to the public, and which, therefore, for the purposes of this case, the Court must hold to be injurious.

We submit, therefore, that even under the general principles of law applicable where there is no special privilege or immunity the rule of the American Publishers' Association, so far as the facts of this case are concerned, was valid and that the court would not be justified in overturning a trade regulation satisfactory to the whole book trade and beneficial to the public, because it tended to prevent Macy & Co. from selling books at a loss to aid in selling clothing and furniture at a profit.

The American Publishers' Association was an organization formed

"to advance the interests of the book publishing business; to foster the trade and commerce of said business and the interests of those engaged therein and in its allied trades and professions; to reform abuses relative to said business; to secure freedom from unjust or unlawful exactions; to diffuse accurate and reliable information as to the standing of merchants and other matters; to procure uniformity and certainty in the custom and usages of the trade and commerce of book publishing; to settle differences between its members and between them and others carrying on business with its members, and to pro-

mote a more enlarged and friendly intercourse in the trade and between business men generally; to provide and establish rules and regulations tending to promote the best interests of its members." (Record, p. 116.)

Its purposes, on a large scale, resembled those with which the Traders' Live Stock Exchange organized the trade of the Kansas City stock yards and which were examined in *Ander-son v. United States*, 171 U. S., 604.

We submit that that case controls the case at bar. From an opinion which is all applicable we quote as follows:

"It will be remembered that the Association does no business itself. Those who are members thereof compete among themselves, and with others who are not members, for the purchase of the cattle, while the Association itself has nothing whatever to do with transportation—nor with fixing the prices for which the cattle may be purchased or thereafter sold. Any yard trader may become a member of the Association upon complying with its conditions of membership, and may remain such as long as he comports himself in accordance with its laws. A lessening of the amount of trade is neither the necessary nor direct effect of its formation. * * * There is no feature of monopoly in the whole transaction. * * *

"In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce because, if it be conceded that they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that

trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act.

"It has already been stated in the *Hopkins Case*, above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several states or with foreign nations. Where the subject matter of the agreement does not directly relate to and act upon and embrace state commerce, and where the undisputed facts show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement are engaged, such agreement is not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and accidental, and not its purpose or object. * * *

"The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good," pp. 614, 615, 616.

And see

Standard Oil Co. v. United States, 221
U. S., 1, 58.

FIFTH POINT.

**An answer to the brief for plaintiffs
in error.**

A.

The statement of the facts (pp. 11-23) is largely devoted to facts existing before April 1st, 1904. At that date the rules of the American Publishers' Association were changed in several respects to conform to the decision of the New York Court of Appeals on demurrer. The amended rules in no way affected dealings in uncopyrighted books and no subsequent acts of the defendants relating to uncopyrighted books appear in the record. The amended rules were set up in the answer. The trial court adjudged the agreement and acts prior to April, 1904, concerning uncopyrighted books unlawful and awarded an injunction and damages therefor. No appeal was taken from this part of the judgment (Record, pp. 174, 175, 5, 6). There was, therefore, in the Court of Appeals and there is now no question relating to uncopyrighted books. All allusions to uncopyrighted books are irrelevant except so far as they enable the Court to understand the history of the litigation.

B.

The statement of the Federal right set up in Point I (a) is not, we think, sustained by the record and we refer to our former brief, pp. 16, 17, 18.

It is said in Point I (*b*), on page 30, that the decision of the Circuit Court of Appeals

“Must necessarily proceed on the ground that the decision and final judgment of the Court of Appeals and Supreme Court of the State of New York involved a determination that the combinations, conspiracies and conduct alleged against the defendants *did not constitute a violation of the federal anti-trust act.*”

This statement seems to be refuted by Judge Ward's opinion (p. 35):

“The fact that the judgment in the State Court depended upon the State statutes and that the complaint in this case is founded on the Federal statute, which is not within the jurisdiction of the State Court, makes no difference. The plaintiffs having the option to go into either court chose the State Court, and their claim having been there adjudicated, cannot be presented the second time to any other court.”

It is said at page 36:

“The defendants in error claimed in that case that the State Court had no jurisdiction of an action to recover treble damages under Section 7 of the federal act, and that so far as the judgments and opinions of the State Courts affected any rights of these plaintiffs under the federal anti-trust act, such decisions are not binding as *authority* upon the federal courts.”

This is strangely inaccurate. Not the defendants in error, but the plaintiffs in their reply

claimed that the state court had no jurisdiction under the Sherman Act (Brief of Plaintiffs in Error, p. 33). Our position was that Maey & Company were estopped from making this denial and that the denial was of no consequence if true. We never claimed that the judgments of the state courts were not binding as *authority* upon the Federal courts. The statement of the learned counsel in that regard may perhaps be due to a misapprehension of this sentence in our brief before the Circuit Court of Appeals:

“We think that the Court of Appeals was right and that the error of Judge Bartlett’s dissenting opinion has been made manifest by the case of *Henry v. A. B. Dick Company*, 224 U. S., 1. We do not argue the question, because the judgment of the state court is offered in this case not as an authority or precedent, but as a thing adjudged. As such its binding force in this court it is in no way dependent upon the correctness of the reasoning by which it was reached.”

C.

In Point II (pp. 37-41) the learned counsel base their argument upon the agreements and acts prior to April, 1904, relating to uncopyrighted books. As has been pointed out, the portion of the judgment not appealed from disposed of these matters and the argument is therefore irrelevant.

It is also inaccurate at page 41 in saying that in 1904 no other change took place in the rules except the amendment that they should apply to copyrighted books only, and in saying that after the amendment the defendants’ “methods were

continued in precisely the same way as theretofore."

In *Montague & Company v. Lowry*, 193 U. S., 38, the essential facts were wholly different. There has been no restriction of membership in either Publishers' or Booksellers' Association and no restriction of trade to members of either association. All publishers may deal freely with all dealers, each publisher imposing on each sale of copyrighted books, a condition which under the copyright law he may lawfully impose.

D.

In Point III there is quotation from *Bement v. National Harrow Co.* It is enough to say that if the publishers had by common action fixed the price of books published under copyrights owned by different publishers they might have made an agreement analogous to that escrow agreement upon which this Court in the *Bement Case* declined to express an opinion. If the publishers had agreed not to sell their copyrighted books except at a price fixed not by trade and competitive conditions, but by the decision of a committee and had established zones of sales they might have brought themselves within the rule stated by Mr. Justice McKenna in the *Standard Sanitary Case*.

But the fixing of prices was left wholly to the individual publishers, each fixing the price of his own copyrighted books. The agreement that all should fix such prices was a lawful trade regulation. There was no limitation as to the persons to whom sales were to be made. The agreement that each member should refrain from selling at wholesale to persons who dealt in copyrighted books in violation of the lawful conditions on

which they were sold by the members of the association was analogous to the rules of Exchanges, Boards of Trade, Labor Unions and other organizations of men engaged in the same occupation.

Arthur v. Oakes, 63 F. 310.

It is, we think, incorrect to say (p. 50) that the agreements controlled the supply, after 1894, of *all copyrighted* books whether published by the members of the Publishers' Association, or not. Rule III provided "that the members of the Association agree that copyrighted books shall be sold by them to those booksellers only" &c. &c. Plainly this refers to the copyrighted books which members of the Association are engaged in selling to booksellers. But each publisher sells to booksellers the books which he publishes. It does not appear that any publisher was also a jobber or ever sold to booksellers any book not published by himself. Furthermore it is plain that the supply to booksellers of the copyrighted books of publishers who did not belong to the Association would continue from them and through jobbers unrestrained and uncontrolled by the rules or the action of the Association.

SIXTH POINT.

If the writ of error be not dismissed the judgment should be affirmed.

All which is respectfully submitted.

JOHN G. MILBURN,
STEPHEN H. OLIN.

OLIN, CLARK & PHELPS,
Attorneys for the Defendants in Error.

RECEIVED
JAN 30 1913

JAN 30 1913

JAMES H. BAKER, JR.,
Clerk

Supreme Court of the United States

OCTOBER TERM, 1912

No. 129

ISIDOR STRAUS and NATHAN STRAUS, Com-
posing the Firm of R. H. MAOY & CO.,
Plaintiffs in Error,

against

AMERICAN PUBLISHERS' ASSOCIATION,
et al.,
Defendants in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR

WALLACE MACFARLANE,
EDMOND E. WISE,
Of Counsel.

INDEX.

Argument.	PAGE
POINT I	1
(a) The Federal question was adequately presented to the Appellate Courts	1-4
(b) The omission of the Court of Appeals to expressly overrule the Federal question is immaterial, if by necessary implication its decision denies the right asserted	4-5
(c) The State Court had no jurisdiction to entertain an action under Section 7 of the Federal anti-trust act, and its decision was no bar to an action under that section	5-6
POINT II	6
1. (a) The State Court had jurisdiction to entertain an action based on the Federal anti-trust act without assuming to entertain an action to enforce one of its provisions	7
(b) The cause of action arose under the law of the United States	8-11
(c) The jurisdiction of the New York Supreme Court to entertain this action is not derived from the Federal Statute creating the right, but from the Constitution and law of the State itself	11-12
2. (a) The special remedy for treble damages given by Section 7 was not intended to exclude all other forms of redress to individuals specially damaged by violation of the act	12-19
(b) The Federal act is intended to be highly remedial. Section 7 of the act was not intended to deprive individuals specially damaged of any rights or remedies which they otherwise would have had, but for Section 7	19-21
3. A court of general jurisdiction has power to grant injunctive relief against special damages threatened	21-22
4. The complaint alleges a right under the Federal anti-trust law	22-24
POINT III. Plaintiffs come into Court with clean hands..	24
A. 1. The alleged fraud (which is denied) is not connected with the subject matter of the action	24
2. The fact that plaintiffs' conduct was injurious to the defendants does not deprive them of their standing in a Court of Equity	25
3. Plaintiffs committed no fraud upon the defendants or the public	26-29
B. Plaintiffs were damaged by defendants' acts.....	29-31
POINT IV. The contracts do not merely involve the right of publishers selling at wholesale to fix by agreement with the purchasing bookseller the retail price, but also a number of other subjects	31-33

POINT V. Even if the agreements only covered the ground erroneously stated in defendants' third point, it does not follow that the whole trade could lawfully combine to do what each might do lawfully as an individual.	33-35
POINT VI. The agreements and acts of defendants prior to 1904, as to uncopyrighted books, are important as disclosing the origin, growth and purpose of the combination	35-37

INDEX OF AUTHORITIES.

<i>Austin v. Gagan</i> , 39 Fed. R., 626	9
<i>Anderson v. United States</i> , 171 U. S., 604	34
<i>Bement v. Harrowe Co.</i> , 186 U. S., 70	4, 5, 18, 31
<i>B. & A. R. R. Co. v. O'Reilly</i> , 158 U. S., 334	24
<i>Bishop</i> , "Non-Contract Law," Sec. 132	7
<i>Biglow v. Cahmet & Hecla Mining Co.</i> , 155 Fed. R., 869	15
<i>Brady v. Nally</i> , 158 N. Y., 278	24
<i>Robbs-Merrill Co. v. Straus</i> , 210 U. S., 339	2, 33
<i>Callan v. Wilson</i> , 127 U. S., 555	34
<i>Chattanooga F. & P. Works v. City of Atlanta</i> , 203 U. S., 390	30
<i>Claplin v. Houseman</i> , 93 U. S., 130	11, 13, 14, 18
<i>Cook v. Whipple</i> , 55 N. Y., 150	11, 13, 14, 18, 20
<i>Dr. Miles Med. Co. v. Parks</i> , 220 U. S., 373	34
<i>1 Foster's Fed. Practice</i> (4th Ed.), Sec. 17, p. 116	9
<i>Globe Newspaper Co. v. Walker</i> , 219 U. S., 356	13
<i>Gold-reashing & Water Co. v. Keyes</i> , 96 U. S., 199	9
<i>Gompers v. Buck Store & R. Co.</i> , 221 U. S., 416	30
<i>Grenada Lumber Co. v. Mississippi</i> , 217 U. S., 433	32, 34
<i>Hopkins v. United States</i> , 171 U. S., 578	34
<i>Kidder v. Horrobin</i> , 72 N. Y., 163	11, 14
<i>Leggett v. Great Northern R. R. Co.</i> , 180 Fed. Rept., 314	9
<i>Locker v. American Tobacco Co.</i> , 121 A. D., 443	17
<i>Locker v. American Tobacco Co.</i> , 195 N. Y., 565	17
<i>Minnesota v. Northern Securities Co.</i> , 194 U. S., 48	15
<i>Mogul Steamship Co. v. McGregor</i> (H. of Lords, L. R., Appeal Cases, Part I, p. 25)	7
<i>Murray v. Chicago & N. W. Ry. Co.</i> , 62 Fed. R., 24	14
<i>Myrtle v. Nevada C. & O. Ry. Co.</i> , 137 Fed. R., 193	9
<i>Natl. Fire Proofing Co. v. Mason Builders' Assn.</i> , 169 Fed., 269	18
<i>Nelson v. Southern Ry. Co.</i> , 172 Fed. R., 478	8
<i>People v. Walsh</i> , 111 N. Y., 266	20
<i>1 Pomeroy</i> , 405	24
<i>Pollard v. Bailey</i> , 20 Wall., 520	13, 14
<i>Rourke v. Elk Drug Co.</i> , 75 A. D. (N. Y.), 115	7, 18, 19
<i>Scribner v. Straus</i> , 219 U. S., 352	33
<i>2nd. Employers Liability Cases</i> , 223 U. S., 1	14
<i>Shoshone Mining Co. v. Rutler</i> , 177 U. S., 505	9
<i>Standard Sanitary Mfg. Co. v. U. S.</i> , 226 U. S., 20	34
<i>State of Iowa v. Chicago, M. & St. P. Ry. Co.</i> , 33 F., 391	10
<i>Straus v. American Pub. Assn.</i> , 177 N. Y., 473	2, 3, 7, 18, 19
<i>Wheeler Stenzel Co. v. Natl. Window Glass Assn.</i> , 152 Fed. R., 864	7, 18

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 172.

ISIDOR STRAUS and another com-
posing the firm of R. H. MACY
& Co.,

*Plaintiffs and Plain-
tiffs in Error,*

against

AMERICAN PUBLISHERS' ASSOCIA-
TION, *et al.*,

*Defendants and De-
fendants in Error.*

PLAINTIFFS' BRIEF IN REPLY.

I.

**Reply to "Point A" of defendants'
brief (pp. 2-11).**

(a) Defendants return to the argument that plaintiffs did not adequately present to the Appellate Courts the federal question raised by their assignments of error.

For plaintiffs' statement of references to the record showing the specification of the question raised by the assignments of error we refer to our brief in opposition to the motion to dismiss filed February 19th, 1912, and to Point I of our principal brief on this argument (pp. 28-29).

The long quotation from the plaintiffs' brief of February 19th, 1912 (*Defendants' principal brief*, pp. 4-8), should have no weight as an admission that on the appeals referred to therein plaintiffs did not intend to and did not in fact present to the Appellate Courts the federal question now relied upon. The record shows the contrary. Defendants appear to shrink from asserting that it was not presented to the Trial Court. Both the appeals referred to in this quotation were interlocutory only. It was the object of the plaintiffs in appealing from the interlocutory judgment to present to the Appellate Division of the State Court the decision of the Supreme Court of the United States in *Robbs-Merrill Co. v. Straus*, 210 U. S., 339, but such presentation necessarily included the position that the restricted construction of U. S. R. S. 4952 in respect to copyright privileges established by the decision of this Court in that case left the defendants, on the facts found by the trial court and incorporated in its "decision," unlawful combinations and conspiracies in restraint of trade in violation of both the state and the federal anti-monopoly acts as alleged in the complaint. The record leaves no doubt about what was before the Appellate Division on the appeal from the interlocutory judgment. The decision of that Court (fol. 531) was simply: "Judgment affirmed with costs, on the authority of 177 N. Y., 473." But the Court certified a question to the Court of Appeals (fol. 517). The form of this question is as follows:

"Are the plaintiffs, under the findings of fact contained in the *decision* in this case, entitled, so far as copyrighted books are concerned, to the relief demanded in the complaint, or to any relief as against the defendants in this case?"

The "decision" (fols. 342-412) includes all the Findings of Fact Nos. 5, 8, 12, 13, 14, 19, 25, 28, 38, 76, 77, 78, and others, showing the application of the federal anti-trust act to the facts in this action. The interlocutory judgment-roll contains, of course, the plaintiffs' proposed findings and their propositions of law V, VII and IX (fols. 486-490) which were refused by the trial Court and plaintiffs' exceptions (fols. 495-509).

The question certified shows that all the questions presented by the *decision* of the trial court were before the Court of Appeals. Necessarily they were also before the Appellate Division. The opinion of the Court of Appeals on this interlocutory appeal shows (fol. 552) that that Court did consider the relation of the copyright statutes to the statutes relating to unlawful restraint of trade. At folio 552 the Court, speaking through GRAY, *J.*, says:

"The object of copyright and of patent statutes is to give monopolies; and that contracts made by the owners of copyrights to secure the fullest protection in the enjoyment of the monopoly will not be condemned by the Courts, *for being in unlawful restraint of trade, we have decided.*"

See also dissenting opinion of Judge WILLARD BARTLETT (559, 561). In the earliest opinion (177 N. Y., 473), Chief Judge PARKER finds his authority for holding the copyright laws unaffected by stat-

utes in restraint of trade in the *Bement* case (186 U. S. 70), which dealt entirely with the federal anti-trust act. His reasoning is: Combinations of owners of *patents* in restraint of interstate commerce are good against the federal anti-trust act; therefore, similar combinations of owners of *copyrights* are good against that act; therefore, they are good against the state anti-monopoly act also.

(b) The defendants in their brief (subdivision C, pp. 6-9) criticise the cases cited in the plaintiffs' brief of February, 1912, in opposition to the motion to dismiss, on the ground that they raise questions arising under the second clause of U. S. R. S. 709, involving the validity of a state statute or ordinance, and assert that in that class of cases much less particularity is required in the assertion of the federal question than in cases like this where the alleged right denied arises under the third clause of U. S. R. S. 709. The cases criticised are not cited by plaintiffs as authorities to relieve the plaintiffs from any lack of particularity in their specification of the federal question. They are cited in support of the familiar proposition that the omission of the Court of Appeals to overrule *expressly* the federal question presented by plaintiffs is immaterial, if by necessary implication its decision denies the asserted right. It would have been just as easy to cite six or probably sixty cases under the third clause of U. S. R. S. 709, in support of the same proposition.

Subdivision D of defendants' "Point A" (defendants' principal brief, pp. 9-11) is covered by our reply to defendants' "First Point."

(c) In plaintiffs' principal brief ("Point I," p. 30) they refer to recent decisions in the Circuit Court and Circuit Court of Appeals in the Second Circuit, in an action brought by them for damages under Section 7 of the federal anti-trust act, in which the judgment of the State Court now presented for review was held to be an adjudication barring the plaintiffs from maintaining an action under Section 7, as authorities in support of their contention that the State Court must have decided that the defendants were not an unlawful combination under the federal anti-trust act. The defendants, in their principal brief (pp. 16-17), endeavor to reduce the plaintiffs' position in citing those decisions to an absurdity but they hardly state it correctly. The plaintiffs contended that the State Court had no jurisdiction to entertain an action under Section 7 of the federal anti-trust act; that the right of action under that section was confined to the United States Courts; that it was for a wholly different cause of action, and so had not been adjudicated against the defendants by the decision in the State Courts. That was what they meant by their reply; not, of course, that the State Court had no jurisdiction to consider the federal anti-trust act for any purpose, or in any aspect; the *Bement* case alone would have been conclusive against such a position, and the passage quoted by defendants (defendants' principal brief, p. 17) from Judge WARD's opinion must be restricted to this contention.

II.**Reply to "First Point" of defendants' principal brief (pp. 13-22).**

The defendants say in substance on this point that if the plaintiffs have technically raised the federal question expressed in the assignments of error it can be of no avail to them because they will then be in the position of bringing in a State Court an action *upon* or to *enforce* the federal anti-trust act, and that no State Court has any jurisdiction to enforce any right or remedy under that Act.

To this the plaintiffs reply:

(1) That an action in a State Court, or an essential term of it, may be based on a right derived from a federal statute, without involving an assumption by the State Court of a forbidden jurisdiction to entertain an action on that statute (*i. e.*, a statutory action) or to enforce any of its provisions.

(2) Congress, while excluding State Courts from entertaining, and both states and individuals from maintaining in any court, direct proceedings to enforce the public remedies under the act, and while confining (we shall assume) to federal courts the action for three-fold damages allowed by Section 7, did not intend to exclude State Courts (otherwise of competent jurisdiction) from entertaining at the suit of an individual, especially damaged, an action in equity for injunctive relief and damages against a combination to restrain interstate commerce in which the plaintiff relies on the

first section of the act to show the unlawful and criminal character of the combination.

1. (a) The Supreme Court of the State of New York is a court of general jurisdiction in law and equity (*N. Y. Const., Art. VI*). It has always had jurisdiction to entertain an action brought by an individual to recover damages specially sustained from an *unlawful* combination or conspiracy of defendants [*Rourke v. Elk Drug Co.*, 75 App. Div., 145; *Straus v. American Publishers' Ass'n* (the present case) 177 N. Y., 473]. Assuming that a combination to restrain interstate commerce, such as has been proved in this case was not, prior to the act, subject to an action by a stranger to it, however specially damaged; that such a combination was then illegal only in the sense of being unenforceable *inter sese*, as soon as a statute was passed making it *criminally unlawful* any person specially damaged obtained a right (in the absence of some prohibitory provision) to maintain an action against the combination.

The change effected by such a statute in such cases is familiar (*Mogul Steamship Co. v. McGregor* (House of Lords, L. R. Appeal Cases, Part I, p. 25). For a full consideration of this point see *Wheeler Stenzel Co. v. National Window Glass J. Assn.*, C. C. A., 3rd Cir., 152 Fed., 864, 871-874, quoting *Bishop on "Non-Contract Law,"* Sec. 132, as follows:

"Whenever a law, a statute, a municipal by-law, or any other law imposes on one a duty, if of a sort affecting the public within the principles of the criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered especially therefrom."

(b) There is nothing novel in the proposition that an action may be maintained in a state court of general jurisdiction, based in whole or in part on a right derived from a federal statute, and still be an action brought under the general law of the State and not one "*on*" the statute, or to "*enforce*" it, or "*arising under*" it.

The numerous removal cases under Section 2 of the jurisdiction act of 1887-1888 in which the attempt has been made to remove the cause from the State Court on the ground that the action was one "*arising under*" a law of the United States illustrate the distinction in a variety of ways. The question in those cases has always been whether an action in a State Court based on a right derived from a federal statute was an action "*arising under*" a law of the United States so as to be removable on that ground to a federal court, under the acts of Congress of 1887-1888 (Act of March 3, 1887, C. 373, Sec. 2, 24, Stat. 553 as amended by Act August 13, 1888, C. 866, Sec. 2, 25, Stat. 431). It has been uniformly held that there is no objection to the State Court applying the federal statute in the action before it; that it must appear from the complaint or statement of the case by the plaintiff that there is some disputed construction of the act necessarily involved from which the cause of action, in part at least, arises, to make it an action "*arising under*" a law of the United States so as to give the right of removal (*Nelson v. Southern Ry. Co.*, 172 Fed. Rep., 478, reviewing all the cases). At page 485 the Court says:

"A suit, as has been pointed out, may well be based on a law without involving in any way the construction of the law * * *."

The Court quotes Mr. Justice BREWER in *Shoshone Mining Co. v. Rutter*, 177 U. S., 505, in which he said (p. 507) :

"We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States within the meaning of the jurisdiction clauses * * *."

(See also *Gold-Washing & Water Co. v. Keyes*, 96 U. S., 199, p. 203; *Leggett v. Gr. Northern R. R.*, 180 Fed., 314; *1 Foster's Fed. Prac.*, 4th Ed., Sec. 17, p. 116.)

The point is that the whole dispute may be on facts to which, when found, the federal law may properly be applied by the State Court (*Austin v. Gagan*, 39 Fed., 626).

In *Myrtle v. Nevada C. & O. Ry. Co.*, 137 Fed., 193, the action was based on allegations that the defendant was engaged in interstate commerce and on the "Safety Appliance" act (Act. Cong., March 2, 1893, C. 196, 27 Stat., 531). In considering the case the Court says (p. 196) :

" * * * The question of fact as to whether the defendant was engaged in interstate commerce, and whether if so engaged its cars were coupled as provided for in said act, can be tried and determined in the State Court as well as here."

That a federal question may be raised in the progress of the cause giving one party or the other eventually a right of review under U. S. R. S. 709 does not displace the jurisdiction of the State Court properly acquired in the first instance (*State*

of *Iowa v. Chicago M. & St. P. Ry. Co.*, 33 Fed., 391, 394).

" * * * If during the trial, in fact a federal question does arise and is decided adversely to the party claiming the protection of the federal constitution or laws, the party aggrieved can by proper proceedings carry the question from the court of final resort in the State to the Supreme Court of the United States."

The *federal statute* and the facts showing the applicability to this case are fully set forth in the complaint. The *federal question*, that is, the controversy over the effect of the federal anti-trust law upon the extent of copyright privilege was injected into this case when the defendants filed their answers setting up as a separate defense that their copyright privileges under the laws of the United States made lawful everything with which they were charged in the complaint. As the case developed the plaintiffs asserted not only the state anti-monopoly act, but also the federal anti-trust act, against the federal right asserted by the defendants under the copyright laws. The plaintiffs claimed that the complaint charged that the defendant combinations were unlawful under both the state act and the federal act. The Court of Appeals decided that in respect to copyrighted books they were in all respects lawful. Therefore, the plaintiffs say, the Court decided against them a question of the construction of the federal anti-trust act with relation to the federal copyright laws which, if determined in their favor, would have removed every obstruction to granting them the whole relief claimed. On this the plaintiffs base their writ of error.

(c) The plaintiffs' position is directly approved also and applied in the familiar and authoritative cases based upon the right conferred upon assignees in bankruptcy by the Bankruptcy Act of 1867 to set aside a fraudulent preference and to recover the property transferred or its value (*Cook v. Whipple*, 55 N. Y., 150); *Kidder v. Horrobin*, 72 N. Y., 159; *Clayton v. Houseman*, 93 U. S. 130). Such preferences were lawful under the law of the State of New York and of other states following the common law rule. It was fully recognized in these cases that the right upon which the actions were based was derived entirely from the federal statute which related to a subject, namely, bankruptcy, within the exclusive jurisdiction of the Federal Government. The State Courts, however, and the Supreme Court held that the jurisdiction of a state court of general jurisdiction to entertain such an action under the general law of the State was not derived from the federal statute creating the right, but from the constitution and law of the State itself. The federal statute, so the reasoning goes in the cases cited, simply extended the definition of fraud, and the jurisdiction of the State Court to entertain every kind of action to set aside fraudulent transfers could not be doubted. The situation presented here is entirely similar. Bankruptcy is quite as exclusively a subject of federal legislative jurisdiction as interstate commerce is; nor have the State Courts a more undoubted jurisdiction over actions involving questions of fraud than they have over actions brought by a person specially injured to recover damages inflicted by an unlawful combination conspiring against the plaintiff's right and interest. The only right created by the federal anti-trust act of which the

plaintiffs seek to avail themselves in the present action is the declaration that such a conspiracy to restrain interstate commerce is *unlawful*. The plaintiffs appeal to this statute as putting the brand of unlawfulness upon the defendants, just as in the bankruptcy cases the State Courts depended upon the federal statute for the illegality of a fraudulent preference.

These authorities assumed that Congress, having exclusive jurisdiction over the subject of bankruptcy, might have excluded the State Courts from assuming jurisdiction of such an action. As the Bankruptcy Act of 1867 had not only created a new right, but had also provided that the District Courts should have jurisdiction to entertain actions to collect the assets of the bankrupt, the argument against the jurisdiction of the State Court was presented in all its apparent mechanical perfection. The Courts, however, held that the exclusion of the State Courts was a question of intention which was not to be determined by the language of the statute alone, but by such language and the general nature of the subject involved. We proceed to consider whether Congress has expressed such an intention in the anti-trust act of July 2, 1890.

2. (a) The plaintiffs claim that there is nothing in the federal anti-trust act which shows that Congress intended to exclude State Courts (of competent jurisdiction in other respects) from taking jurisdiction of an action for injunctive relief and damages brought by a person specially damaged against an unlawful combination operating in restraint of interstate commerce.

We think it will appear that the question simply comes down to this: Was the special remedy for treble damages given by Section 7 intended to

exclude all other forms of redress to individuals specially damaged by violations of the act?

The case does not fall within the rule of *Pollard v. Bailey* (20 Wall., 520, 525), *Globe Newspaper Co. v. Walker* (210 U. S., 356), and similar cases, in which the general liability (*e. g.*, that of stockholders of an insolvent corporation to its creditors, or of an infringer of copyright for damages), did not exist at all at common law, but was created by the statute, and in which, therefore, the special remedy provided was held to be exclusive.

The civil liability of the parties to a conspiracy to do an unlawful act, or accomplish a lawful purpose by unlawful means, was not created by either the federal or state anti-monopoly acts. It had existed from time immemorial. The federal act merely enlarged the class of unlawful combinations, just as the Bankruptcy Act of 1867, defining a fraudulent preference, brought a new kind of fraudulent transaction within the established jurisdiction of State Courts over actions involving fraud (*Cook v. Whipple, supra; Claflin v. Houseman, supra*).

It should be remembered, too, that the federal anti-trust act (Section 13) is to be considered in two aspects. It is first of all a penal statute, and provides as well, but independently, for certain civil proceedings. The penal provisions of the first section, which alone plaintiffs invoke in this action, declaring certain combinations and conspiracies in restraint of interstate commerce to be unlawful and criminal, are not in any way coupled with the special remedy established by Section 7. They are enforceable primarily by criminal proceedings. In this respect the federal anti-trust act with relation to the plaintiffs' right to maintain this action dif-

fers entirely from the statutes under consideration in *Pollard v. Bailey*, and similar cases.

Obviously, the public remedies provided by the act cannot be asserted by any individual or in any State court. The criminal prosecution for violations of Sections 1 and 2 must be maintained in the federal courts in the name of the United States. So with the direct proceeding to restrain and dissolve unlawful combinations. Those proceedings must be instituted in the name of the United States through its own officials. Presumably so with the forfeiture proceeding.

The general rule that rights of action created by federal statutes on subjects wholly within the legislative jurisdiction of Congress not only may, but *must*, be enforced by State Courts, when called upon, unless Congress expressly or by necessary implication has excluded their jurisdiction, is thoroughly established, though still often overlooked by State tribunals. It is equally well established, and indeed a part of the same rule, that in giving effect to such rights the State Courts do not derive jurisdiction from the federal statute, but if otherwise of competent jurisdiction simply apply to the new right of action their general powers in law and equity (*Clafin v. Houseman*, 93 U. S., 130; *2d Employers' Liability Cases*, 223 U. S., 1, 55-58; *Cook v. Whipple*, 55 N. Y., 150, 162, 165; *Kidder v. Horrobin*, 72 N. Y., 159).

In *Murray v. Chicago & N. W. Ry. Co.*, 62 Fed., 24, page 43, the Court said:

"The Legislature of a State cannot abrogate or modify any of the provisions of the Federal Constitution, nor of the Acts of Congress touching matters within congressional control, but the Courts of the State, in the

absence of a prohibitory provision in the Federal Constitution or Acts of Congress, have full jurisdiction over cases arising under the Constitution and laws of the United States."

There have been a number of cases in the lower Federal Courts and in the State Courts in which it is stated that the State Courts can enforce no right under the federal anti-trust act, and that no private individual can maintain any proceeding under it in either State or Federal Courts except the action for treble damages in the Federal tribunals. This has been entirely too much taken for granted. Nearly all the cases have been attempts, like that in *Minnesota v. Northern Securities Co.*, 194 U. S., 48, to enforce one or other of the public remedies provided by the act. What these cases really hold is that these direct proceedings cannot be maintained by a private individual or in a State tribunal.

In *Biglow v. Calumet & Hecla Mining Co.*, 155 Fed., 869, the plaintiff filed his bill in the Circuit Court of the United States for the Western District of Michigan alleging special injury at the hands of the defendants as an unlawful combination in violation of the federal anti-trust law and the anti-monopoly act of the State of Michigan. The Federal Court obtained jurisdiction on the ground of the diverse citizenship of the parties. Objection was made that the plaintiff could not obtain any relief by injunction for violation of the federal anti-trust act and that the only remedy any parties specially injured could have under that act was an action for treble damages under Section 7. The Court held that a private party who has

sustained special injury by a violation of the federal anti-trust act may sue in a Federal Court for an injunction under the general equity jurisdiction of the Court where by reason of diversity of citizenship of the parties the Court has jurisdiction of the suit. On this question the Court said, page 876:

"The question whether a bill for injunctive relief can be maintained under the federal anti-trust act at the instance of a private party is not free from difficulty. It is strenuously contended that under neither the federal anti-trust act nor the State act can relief by way of injunction be granted to a private party; that Section 4 of the federal act, which provides for injunctive relief, is expressly limited to suits brought at the instance of the Attorney General; and that Section 7 of the federal act, giving to an injured party a right of action at law for treble damages, considered in connection with Section 4 referred to, by necessary implication excludes the right of a private party to maintain any suit except that for treble damages under Section 7, regardless of the general equitable jurisdiction of the Court. Some of the cases cited affirm this contention. Others of them, in my judgment, do not, but, on the contrary, recognize the rule that the prohibition against injunctive relief under the federal act is limited to suits brought for injuries common to the general public, and that under the general jurisdiction of equity relief may be granted to a private party against violations of the anti-trust act."

The Court then reviewed all the cases in which the question has been raised and concluded as follows, p. 877:

"While the decisions referred to are entitled to great respect, they do not commend themselves to my judgment so far as they deny the right of a private party, who has sustained special injury by the violation of the anti-trust act, to relief by injunction under the general equity jurisdiction of the Court. As already seen, the cases referred to do not generally announce such rule."

If the Federal Court, obtaining jurisdiction on grounds of diversity of citizenship, can grant relief to individuals, specially damaged, against violations of the federal anti-trust act under the Court's general jurisdiction in equity, it follows that the State Court can do the same thing where it properly obtains jurisdiction of the parties.

The defendants cite the case of *Locker v. American Tobacco Co.*, 121 App. Div., 443, affirmed 195 N. Y., 565, as authority for the proposition that the State Courts cannot enforce, apply or even consider (defendants' main brief, pp. 10, 16) any of the provisions of the federal anti-trust act or sustain any right of action derived from it. The sweeping dictum in the opinion, quoted in defendants' principal brief (pp. 15-16), is not based upon any reasoning, or the slightest consideration of the question. It is not probable that the Court meant anything more than that the direct enforcement of the public provisions of the act, and the special remedy for three-fold damage therein allowed, must be pursued in the Federal Courts. If it means anything more than this we submit that it is erroneous, and could not have been meant to overturn the principle established in such recog-

nized authorities as *Cook v. Whipple* and *Claflin v. Houseman* (*supra*).

The case of *National Fire Proofing Co. v. Mason Builders' Assn.*, C. C. A., 2nd Cir., 169 Fed., 259, 263, relied on by defendants in support of their position on this point (defendants' principal brief, pp. 15-16) is not in point. The Court's statements that agreements such as those denounced by the State anti-monopoly law and the federal anti-trust act are merely unenforceable between the parties, but are not illegal in the sense that they give an individual specially injured a right of action, is at most true so long as there is no statute denouncing such agreements or combinations as unlawful and making them crimes. It is hardly conceivable that the Court meant to deny the change in the relation of such illegal combinations to individuals, specially injured, made by a statute making them criminally unlawful. For a discussion of this subject we refer again to the case in the Circuit Court of Appeals for the 3rd Circuit—*Wheeler Stenzel Co. v. National Window Glass J. Assn.*, 152 Fed., 864.

Indeed, the Court in the case of the *National Fire Proofing Co.* (*supra*), seems to have recognized that if the allegations of the complaint were sufficient the action could be maintained as one for damages caused by a conspiracy. The decision of the Court of Appeals in this case (177 N. Y., 473) and such cases as *Rourke v. Elk Drug Co.*, 75 App. Div., 145, show that the State courts find no difficulty in sustaining such actions.

In their principal brief (p. 14) the defendants say: In *Bement v. National Harrow Co.*, 186 U. S., 70, 87, it was "assumed" that a person injured in his

person or property by violations of the Sherman Act must sue in a Federal Court, and from this, they say, it seems to us to follow "that a State Court has no jurisdiction under the act." The use of the word "assumed" in the Bement case, in the passage referred to, obviously means—assumed for the purposes of the argument. It is a form adopted when the Court reserves a question for future consideration if necessary.

(b) The federal act is intended to be highly remedial. But to confine individuals specially damaged by violations of the act to an action at law for three-fold damages under Section 7, would be to impair greatly the remedies that would have been open to them if Section 7 had not been contained in the act. If the right of action expressed in Section 7 had not been given, then under the established general rules any individual, specially damaged by a violation of the act, would have had in the State Courts all the rights and remedies at law and in equity applicable to his case.

The New York Anti-Monopoly Act (Ch., 690, L. 1899) contains no provision at all for a private remedy available to persons specially damaged by violations of its provisions. It provides only a criminal penalty and a direct proceeding by the Attorney General by injunction, etc. Yet the State Courts have never doubted the right of an individual to maintain an action like the present in which the State statute is invoked to show the unlawfulness of the defendant combination (*Rourke v. Elk Drug Co.*, 75 App. Div., 145; Decision of the Court of Appeals in this case, 177 N. Y., 473).

Many cases must arise in which an action at law for three-fold damage will be a very inadequate

remedy. The threatened damage to the individual from violations of the act may easily be far the most important thing to him. He may be threatened with ruin unless he can restrain the injurious conduct of the unlawful combinations. In the action under Section 7 he can recover only the damages actually sustained to the time of the trial, and if he can have no injunctive relief must go on from time to time bringing such actions for successive periods. If the defendants' position is correct the individual injured has no effective remedy except to endeavor to rouse the Government to take direct action for his protection. Is it not wholly improbable that Congress intended to restrict the complete remedies open to individuals for their protection against violations of the act under the general law of the State and to replace them by a single, wholly imperfect and inadequate remedy? There appears to be no reason for such a position. Section 7 may reasonably be held to have been passed only for the purpose of giving an especially heavy measure of damages which could not be applied in any Court except by statutory provision, but not to restrict the general remedies open to individuals at law and in equity without any special provision in the statute.

No confusion or trouble can arise from maintaining the right of State Courts, obtaining jurisdiction, to entertain actions like this based on an alleged violation of the federal act any more than confusion arises in any case of concurrent jurisdiction in the State and Federal Courts. The remarks of the Court of Appeals in *Cook v. Whipple*, 55 N. Y., 164, are pertinent on this point. So also is the declaration of the Court of Appeals in *People v. Welch*, 141 N. Y., 266, in which it was claimed

that a federal criminal statute had superseded the State statute making punishable assaults committed on board of vessels on the Hudson River. The Court said at page 273:

"But it is obvious that to exclude the jurisdiction of the State Courts over matters within their ordinary jurisdiction the intention of Congress to exercise this power should be distinctly manifested, and that the legislation relied upon to deprive the State Courts of jurisdiction should be clear and unambiguous. There can be no presumption that state authority is excluded from the mere fact that Congress has legislated. There must be express words of exclusion, or a manifest repugnancy in the exercise of state authority over the subject."

If these views are correct, then when the defendants presented their defense that the federal copyright laws gave them a monopoly ample enough to justify everything charged against them in the complaint, the plaintiffs had a right to claim, and did claim, that the Court must test the extent of this copyright monopoly both by the State and the Federal anti-monopoly laws. When the State Court decided (by necessary intendment from its judgment) that the defense was good under both statutes, the plaintiffs obtained a right to review that decision here on the ground that the insufficiency of the defense under the federal act was a federal right asserted by them and overruled.

3. The next objection (b) of defendants' "First Point" (pp. 13, 17 of their principal brief) that the State Court could not apply the federal anti-trust act as a test of the sufficiency as a defense of defendants' claim of monopoly under the

copyright laws, because the complaint prays for injunctive relief, and because only the United States can obtain an injunction under the federal act, has been covered in the foregoing argument. It is quite clear that the injunctive relief which the plaintiffs are interested in obtaining relates to the special damage threatened to themselves, and has no direct relation to the public. It appears to be entirely within the powers of any Court of general equity jurisdiction to allow such an injunction if the action is otherwise maintainable. That the prayer for relief in the complaint is too broad (fol. 72) should not defeat the action. Subdivisions 1 and 2 (fols. 72-73) should be disregarded. The trial Court did this, restraining the injunctive relief granted as to uncopyrighted books to the special damages threatened against the plaintiffs.

4. The objections (c) and (d) (defendants' principal brief, p. 13, 18-22) attack the complaint as multifarious and insufficient to state a cause of action under the Sherman Act. While we do not concede that the complaint should be considered to mingle two causes of action because it asserts the illegality of the defendants under both statutes, these objections, even if otherwise good, are too late. They should have been raised by demurrer to the complaint for misjoinder of causes of action, or for insufficiency (*N. Y. Code of Civ. Proc.*, Sec. 488); or if the defects did not appear on the face of the complaint, the objection should have been taken by answer (*N. Y. Code of Civ. Proc.*, Sec. 498); otherwise they must be deemed to have been waived (*N. Y. Code Civ. Proc.*, Sec. 499). If the complaint and the proof as embodied in the findings of the special term include everything necessary to assert the rights of the plaintiffs under both the federal

anti-trust act and the State act, any deficiencies of the complaint in that respect must be deemed to be supplied.

The defendants did demur to the complaint (177 N. Y., 473) and their demurrer was overruled.

The defendants say (p. 20 of their principal brief) that the plaintiffs rely on paragraph "Nineteenth" of the complaint, and they proceed to argue that this paragraph is wholly inadequate to show any intention to allege any right under the federal anti-trust act. This paragraph, however, must be read with paragraphs "Second," "Fourth," "Seventh," "Ninth," "Fifteenth," "Eighteenth," and "Twenty-third" of the complaint. The paragraphs of the complaint referred to set out clearly the interstate character of the combination of the defendants and its operation in interstate commerce. Paragraph "Fifteenth" (p. 51) charges fully and distinctly the unlawful character of the combination in violation of the federal anti-trust act of July 2, 1890. The complaint, of course, must be read as a whole. The allegations were quite sufficient under the law of New York to admit, especially *in the absence of any objection*, the proof embodied in the findings of fact of the trial Court, 5, 8, 12, 13, 14, 19, 25, 28, 38, 76, 77, 78 (p. 116, *et seq.*).

In all the New York cases cited by defendants in their main brief (pp. 20-22) the proof was on an issue not raised by the pleadings, and objection was duly made and pressed by motion to non-suit, or in other sufficient form. Here, (1) the complaint is sufficient to allow the proof; (2) the findings show that the trial Court admitted the proof, and if the complaint was insufficient, no objection

to the variance appears to have been made at the trial. Defendants have not appealed, and they cannot take such an objection now. If it had been at the trial any necessary amendment could then have been allowed (*Brady v. Nally*, 151 N. Y., 258, 260, and cases cited; *B. & A. R. R. Co. v. O'Reilly*, 158 U. S., 334).

III.

Reply to defendants' "Second Point."

The second point of defendants-in-error, namely, that plaintiffs-in-error have not come into a Court of Equity with clean hands, and that they have suffered no actionable damages was not raised either in the pleadings or on the trial. Assuming, without conceding, that it is open to discussion at this stage of the litigation, it is neither supported by the facts, as found, nor by any argument which can be based upon the situation as disclosed by the record.

1. Even if plaintiffs had been guilty of some fraud upon the public (which is strenuously denied) in advertising that other goods, where comparison was more difficult than in books, were sold cheaper by them than their competitors, their conduct in this respect is not so connected with the same matter or transaction upon which defendants are sued as to make applicable the maxim invoked by defendants in this point (*1 Pomeroi*, 405). The Court below found that as to uncopyrighted books, which formed the subject of the combination as much as copyrighted books, the defendants had been guilty of the unlawful agreements and con-

duct they were charged with and awarded both injunctive relief and damages against them and very clearly would have included copyrighted books also, and have overthrown the whole combination, had it not been for the Court's erroneous view of the extent of defendants' copyright privileges. If plaintiffs had been guilty of conduct so unjust or wrongful as to deprive them of recognition by a court of equity, the Trial Court should not, and would not have given a judgment in favor of the plaintiffs on that portion of the combination which affected uncopyrighted books.

Defendants-in-error claim that plaintiff's conduct towards defendants' copyrighted books was "monopolistic," injurious to the publishers and the booksellers, and fraudulent as regards the public.

The argument that plaintiffs' practices were "monopolistic" as against a combination which controlled seventy-five per cent. of the publishing business (Finding 8, page 117), and a large majority, both in numbers and in extent of business, of the members of the wholesale and retail book trade, is so absurd that it is hard to believe that it is advanced seriously, and certainly requires no answer.

2. Even if plaintiffs' conduct was injurious to the publishers and the booksellers that fact cannot deprive them of their standing in a court of equity. If the publishers were unanimous in their desire to establish a fixed price system at retail, in order to restrain or destroy competition in the retail price of copyrighted books that fact of itself proves them to be wrong-doers and violators of the anti-trust laws, and the mere fact that the plaintiffs-in-error refused to co-operate with them, though it may have proved injurious to the policy of the pub-

lishers, certainly does not destroy their standing in equity in an action brought to restrain the publishers from this unlawful purpose and from their unlawful methods of carrying it into effect, so far as directed against plaintiffs and inflicting special damages upon them.

In any event, even if Macy's conduct proved injurious to the publishers and booksellers, it was not injurious to the public interests. The publishers and booksellers sought to destroy competition at retail and to establish fixed prices to the injury of the public, and if plaintiffs-in-error acted in a manner injurious to them, it was solely in that they prevented them from securing advantages which would result from their unlawful agreements and contracts, and which were detrimental to the public interests.

3. Plaintiffs-in-error are charged with committing a fraud upon the public through their dealings in copyrighted books. The argument (page 28 of the brief of defendants-in-error) appears to be that Macy's advertisement that they sold books cheaper than anyone else, and that in other lines where comparisons were more difficult they likewise sold articles of the same quality at less than competitors, is a false statement of fact, because they sell their books below cost, and, as they cannot sell their other merchandise below cost and make a profit, it necessarily follows that they misrepresent facts to the public. This argument is wholly erroneous and inaccurate in its statement of facts. It is true that until within a year of the trial plaintiffs had sold two magazines below cost (Finding 94, page 134). It is also true that at the times *to meet competition*, plaintiffs had sold new copyrighted books at

less than the cost and had advertised such sales. Upon this slender basis of fact, the defendants-in-error have built up an argument that *all* the books that plaintiffs-in-error sold were sold below cost. They were unable to prove, or at least the Court has not found, that a single copyrighted book that Macys had sold during the whole period of the litigation was in fact sold, or advertised for sale at less than the wholesale price. In a retail business of \$250,000 a year (Finding 2, page 115) if it were a usual, or even a frequent occurrence to sell books below cost it would not be difficult to find such instances and to prove them. *Defendants have failed to give the title of a single book that was sold BELOW COST*, though they did prove that two magazines were so sold (Finding 94, page 134) and were able to show both the purchase and sales price of those two insignificant items. The Court found that Macy advertised *books* at lower prices than other dealers, but there is no finding that they so advertised magazines (Findings 93 and 94). Defendants base their charge of fraud on the public, on books which *were* advertised, and not on magazines which were *not advertised*; yet they prove the usual sale of two specified magazines below cost, and only the vague fact that *in order to meet competition* books were *at times* sold below cost (Finding 95, page 134). Defendants argue, without a shadow of evidence to support them, that *books* were "bought from month to month, or day to day" for the express purpose of being sold at less than cost. This practice, so foreign to ordinary commercial usage continues because "books are merely a peg on which to hang a general story"—"the false story that other articles are sold more cheaply than books. This false story is told in

"many forms" (defendants' brief, p. 28). Defendants' lack of accuracy is made conspicuous by the findings of the trial Court.

The decision gives the *retail* price at which plaintiffs sold books (Finding 53, p. 125; Finding 62, p. 127), and also gives an easy and practically accurate method of establishing the wholesale price (Findings 48 and 49, p. 125), at which they bought.

It appears that the ordinary purchase price at wholesale of the dollar and one-half book, which was sold by defendants for \$1.08 (Finding 61, p. 126), and by plaintiffs for 98c. (Finding 53, p. 125; Finding 62, p. 122) was 40% from the list price, and in quantities 40 and 5%, and in larger quantities 40 and 10% discount from the list price, and an additional discount for cash (Finding 48, p. 125). The so-called dollar and one-half book, purchased by Macys in large quantities cost them without a cash discount 81 cents. If an additional discount of 2% for cash were given, it cost them 79½ cents. They ordinarily sold the book for 98 cents, a profit of 18½ cents, or 23 7/10% on the purchase price.

The wholesale price of net books after May, 1901, was 25% discount from list prices with an additional discount for larger quantities (Finding 49, p. 125).

Now take what defendants in error concede to be a typical transaction (p. 33, defendants' brief). The copyrighted book, "*Tarry Thou Till I Come*" (Findings 43-47, p. 124) was published by the Funk & Wagnalls Publishing Co. at the net price of \$1.40. Deducting 25% and 10% for quantities makes the cost price of this book 95½ cents. Plaintiffs in error sold this book for \$1.24, making a profit of 28½ cents or 30% on the cost price.

The publishers insisted that the profit should be 44½ cents or 46 8/10 (plus) per cent. *The sale of this book at less than the fixed price started the campaign of boycott against plaintiffs* (Findings 45-47, p. 174).

These are the facts as found in the record, and as known to the defendants-in-error, nevertheless, the allegations constantly are re-iterated that plaintiffs-in-error *habitually* sold their goods at a price which yielded them no profit, for the purpose of deceiving the public into the belief that their other goods were sold at a similar rate.

B.

Plaintiffs Were Damaged by Defendants' Acts.

It may be true, as claimed by the defendants-in-error, that, if the plaintiffs had joined the defendants in their combination and obeyed their restrictions and regulations, they might not have suffered any injury, but if they did not choose to enter that combination; if they refused to be bound by agreements as to price or the persons to whom sales were to be made; if they elected to stand upon their constitutional right to do a lawful business in a lawful way, without submission to the dictates of a powerful combination which sought to enhance prices, then they were placed upon the cut-off lists, and were unable to purchase supplies of books for their book department in the ordinary course of business *and with the customary discounts* (Finding 55, p. 125). The dealers who had ventured to sell to them in spite of the regulations of the defendants, were, in some instances, wholly ruined and driven out of business (Find-

ing 57), and the trade at large was warned against dealings with the plaintiffs (Findings 58 and 59). If plaintiffs-in-error were compelled to pay an increased price by reason of the unlawful acts of the defendants, that increase is an element of damage which they are entitled to recover from the defendants, if it was the result of their unlawful acts.

*Chattanooga Foundry and Pipe Works v.
City of Atlanta*, 203 U. S., 390.

Even if no special damage had been shown (and the Court below found that there was), as to uncopyrighted books, the operations of the combination directed towards the destruction of plaintiffs' sources of supply, and the consequent obstruction to their lawful dealing in books, is the subject of equitable relief.

As was said by Mr. Justice Lamar in *Gompers v. Buck Store & R. Co.*, 221 U. S., 418, at page 438:

"The Court's protective and restraining powers extend to every device whereby property is irreparably damaged, or commerce is illegally restrained."

And he again says:

"But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless.

This power when unlawfully used against one cannot be met except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preven-

tive powers of a court of equity. When such appeal is made, it is the duty of Government to protect the one against the many as well as the many against the one."

IV.

Reply to defendants' "Third Point."

The contracts or combinations which are claimed to be unlawful, do not, as stated in the head lines of the Third Point of Defendant's Brief, involve, merely the right of a publisher selling at wholesale to fix, by agreement with the purchasing bookseller, the retail price of such copyrighted books.

The contracts are much more comprehensive. They include agreements and resolutions of the American Publishers Association and its members, and the American Booksellers Association and its members, which are *not* agreements between owners of respective copyrights and their respective licensees (Finding 87, p. 133) to fix the retail price at which the books should be re-sold. They furthermore include agreements by which the several owners of separate copyrights each agrees not to sell to any dealer who does not maintain the price of all net books published under the copyrights owned by the other members of the American Publishers Association or any of them. These were the precise elements which were missing in the *Bement* case, where it was held that certain contracts between the owner of a patent and his licensee were not within the anti-trust act (see plaintiff's principal brief, pp. 47 and 48). In the case at bar, the agreements of all the publishers and booksellers which precluded them from selling any and all books to plaintiffs because the plaintiff had re-

fused to obey the restrictions on the price of "*Tarry Thou Till I Come*," published by one of the publishers, is an altogether different and distinct thing from the refusal of Funk & Wagnalls, who published that book, to have any dealings with the plaintiffs *Grenada Lumber Co. v. Mississippi*, 217 U. S., 433, 440-441. The coercion and intimidation exercised by the defendants upon the trade at large by reason of plaintiffs' sale of "*Tarry Thou Till I Come*" at less than the net price, their driving dealers who dealt with the plaintiffs into ruin, can find no support in either the *Bement* case or any of the cases cited in defendant's brief.

At page 48, counsel says:

"In the case at bar the question is as to the validity of a contract between the owner of a copyright and his vendee or licensee as to the price and terms on which the copyrighted article might be dealt with by the vendee."

This is directly contrary to the Findings of Fact 74 and 75, page 128, *et seq.*, Findings 87, 88 and 89, page 133.

It is expressly found that the contracts under consideration were *not* agreements between the owner of a copyright and his licensee. In any event, in so far as these plaintiffs are concerned, the operations of the combination became formidable only because the publishers induced the American Booksellers' Association and its members, including the majority of the wholesale and retail book trade of the United States to join in the combination and carry its regulations into effect. This is especially true of the wholesale dealers who, if permitted to sell to Macys at wholesale, would

have constituted a source of supply to Macys, as well as to all other retail dealers who did not feel sufficient interest to join the Association.

There is not the slightest pretense that these wholesale dealers, or in fact the retail dealers, either owned the copyrights or published any of the books that Macys sought to buy. They, nevertheless, were by their contracts bound not only not to sell to Macys, but not to sell to any one who was suspected of reselling to Macys.

The remaining portion of the Third Point is virtually an attempt to reargue the questions submitted to this Court in *Bobbs-Merrill Co. v. Straus*, 210 U. S., page 339 and *Scribner v. Straus*, 210 U. S., 352. In both cases, counsel for the defendants-in-error in this case submitted briefs which contain substantially the same argument as is now again presented to this Court on the extent of the powers granted by the copyright law. In answer thereto, plaintiffs-in-error beg leave to refer to the opinion of Mr. Justice DAY in those cases and to the briefs filed at that time.

V.

Reply to Defendants' "Fourth Point."

The defendants in their "Third Point" argue that each one of the defendant publishers acting alone had a right to sell his copyrighted books to those booksellers only who would maintain the retail price and who would agree to sell such books to no one who cut the publisher's net price; and then in the "Fourth Point" they argue that each publisher could agree with other publishers that he would conduct his own business according to this

method which, as an individual, he could lawfully pursue.

Even if the agreements had been found to go only so far as is erroneously assumed in the third point, it by no means follows that all the trade could lawfully *combine* to do what each might lawfully do as an individual. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished if the result be harmful to the public or to the individual against whom the concerted action is directed.

Grenada Lumber Co. v. Mississippi, 217 U. S., 433.

Callan v. Wilson, 127 U. S., 540, pp. 555, 556.

The defendants rely greatly on the cases of *Hopkins v. United States* (171 U. S., 578) and *Anderson v. United States* (171 U. S., 604) (defendants' principal brief, pp. 52, 60). They even go so far as to argue that the Anderson case is controlling in the case at bar. It seems to us that on the point of the decision in both the Hopkins and Anderson cases the present case does not resemble them. On the contrary, the agreements of the publishers and booksellers involved in the present case contain as their direct and avowed purpose the very element of restraining interstate commerce by fixing and maintaining prices of articles bought and sold in such commerce, and of restraining competition in the price of such articles, the absence of which was the controlling circumstance in the decision in the Hopkins and Anderson cases. The present case is in all substantial respects the same as the case of *Dr. Miles Medical Co.* (220 U. S., 373), and the

case of *Standard Sanitary Mfg. Co. v. United States* (226 U. S., 20).

The remainder of this point has been sufficiently answered in plaintiff's main brief.

There are certain statements of fact, however, made which should not be allowed to pass unchallenged. At page 53, the brief quotes the allegations of the "Twelfth, Thirteenth and Fourteenth" paragraphs of the complaint and argues therefrom that plaintiffs' own allegations disclose that uniformity of price for a book was advantageous. Defendant-in-error has failed, however, to point out as was in fact found by the Court (Findings 16, 17, p. 118) that the lack of uniformity in price which plaintiffs criticized, was such lack of uniformity in the *same store*.

The charge is that in the same store books published at list prices were sold to various customers with varying discounts.

Plaintiffs sold the same book at the same price to all purchasers without any discount.

The new combination did not, however, consider it an evil to have different prices in the same store to different customers, because in 1902, as is set forth in the answer of the defendants, the rules were changed so that books could be published not only at a net price, but at a so-called "*restricted*" price (see Exhibit B attached to answer, pp. 47 and 48), and it was provided that on all works of fiction (not net) published after February 1, 1902,

"the greatest discount allowed at retail for one year after publication shall be 28%, and all rules for the protection of net books shall apply to the protection of fiction to that extent."

This meant that the retailer could sell at any price he chose, provided he did not sell at less than 28% discount from the list price.

The very evil, therefore, which according to plaintiffs' brief (p. 54) it was intended to stop, as now pretended, namely that in the same store the same book should not be sold at different and varying discounts to different persons, was abolished for only one year, and was then re-instated and protected.

VI.

In answer to plaintiffs' brief, defendants criticise a statement made at page 36 of plaintiffs' brief as "strangely inaccurate." It is obvious that the word "*defendants-in-error*" is a misprint for "*plaintiffs-in-error*" and the error has since been corrected.

In Point "C" at page 64, it is claimed that the argument of plaintiffs-in-error is addressed to acts prior to 1904 relating to uncopyrighted books and it is intimated that this is improper. The judgment appealed from involves the denial of all right whether by way of injunctive relief, or by way of damages, for any acts of the defendants concerning copyrighted books, whether they took place before or since 1904. In the action in the State Court, if plaintiffs were entitled to relief as to copyrighted books, damages should have been awarded in precisely the same way as they were awarded as to uncopyrighted books. The Court having refused to do so, although requested, and the refusal being based upon the ground that the copyrights protected the combination from any attack by reason of the Sherman Anti-trust Law or the State law, the question of damages that ac-

incurred prior to 1904 is as much subject to review in this Court as the damages that were incurred subsequently. The agreements of defendants as to uncopyrighted books prior to 1904 are most important as disclosing the origin, growth and purpose of the whole combination.

At page 64, counsel further charges another inaccuracy in plaintiffs' main brief, in that it says that after the amendment the defendants' "methods were continued in precisely the same way as theretofore."

The language of the Finding of Fact upon this proposition (see Finding 67, p. 127) is as follows:

67. That thereafter the said two associations and their respective members continued the same methods as to ascertaining the plaintiffs' supply of copyrighted books, of cut-off lists and of circulars to the trade which had been adopted by them prior to the amendment of the resolutions and agreements in April, 1904."

CONCLUSIONS.

It is respectfully submitted that the judgment of the State Court be reversed so far as appealed from and the case remanded.

EDMOND E. WISE,
Solicitor for Plaintiffs-in-Error.

WALLACE MACFARLANE,
EDMOND E. WISE,
Of Counsel.

FEB 19 1913

JAMES H. McKEWNE
Clerk**Supreme Court of the United States**

October Term, 1912

No. 129

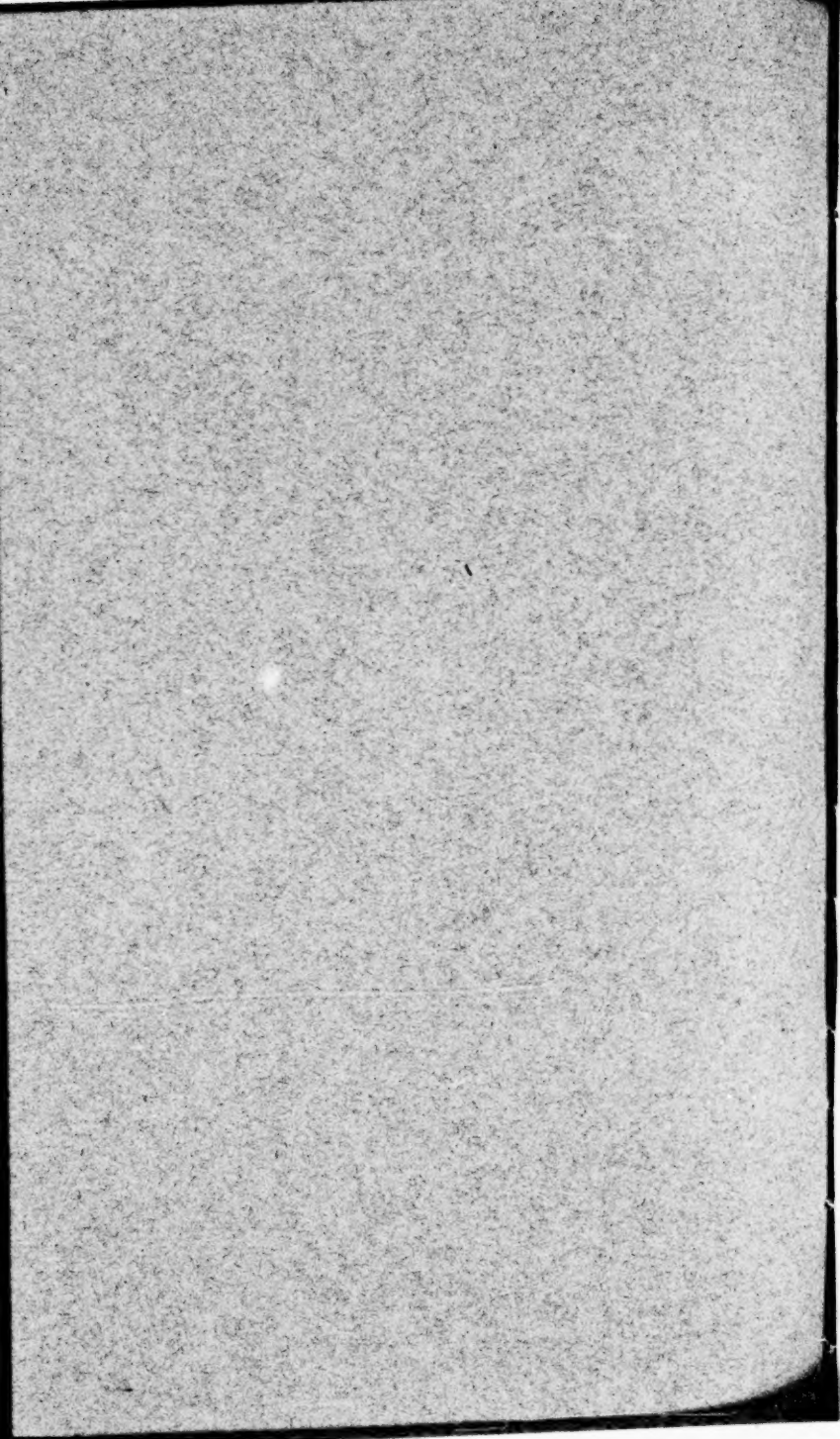
ISIDOR STRAUS and Another, composing the firm
of R. H. Macy & Co.,
Plaintiffs and Plaintiffs in Error
against

AMERICAN PUBLISHERS' ASSOCIATION and
Others,
Defendants and Defendants in Error

Brief in Answer to Plaintiffs' Brief in Reply

OLIN, CLARK AND PHELPS,
Attorneys for Defendants.

JOHN G. MILBURN,
STEPHEN H. OLIN,
Of Counsel.



Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 172.

ISIDOR STRAUS and Another com-
posing the firm of R. H. MACY
& Co.,

*Plaintiffs and Plaintiffs
in Error,*

against

AMERICAN PUBLISHERS' ASSOCIA-
TION and Others,

*Defendants and Defendants
in Error.*

Brief in Answer to Plaintiffs' Brief in Reply.

To so much of the Reply Brief as contains new matter which calls for discussion by us this brief is intended as an answer.

A.

At page 5 counsel refer to the decision of *Straus v. American Publishers' Association* in the Circuit Court of Appeals for the Second Circuit and they say:

The defendants, in their principal brief (pp. 16, 17) endeavor to reduce the plaintiff's position on every question to its absolute; but they surely state it correctly.

The plaintiffs contended that the State Court had no jurisdiction under Section 7 of the Federal anti-trust act; that the right of action under that section was confined to the United States Courts; that it was for a wholly different cause of action and on facts very materially different from the defendants' by the decision of the State Courts. That was what was meant by the reply.

As Judge Ward's opinion at page 22 of the principal brief of the plaintiffs in error it is said:

"The plaintiffs relied in their defense that the judgment in the State Court was not *res judicata*, and that the cause of action was not the same as that in the action in the State Court because damages in respect to injury to the books were excluded in the latter action, because the present action was founded on the Federal Statute, under which the State Court had no jurisdiction, *decisions*, &c." (Italics ours.)

We think that the plaintiffs' reply should be taken to mean what it said. It is, we submit, not possible to suppose that the plaintiffs meant by the reply to say that the "State Court had no jurisdiction to entertain its action under section 7 of the anti-trust act" for the reason (among others) that upon such a supposition the reply would be obviously ineffectual. To deny the jurisdiction of the state court under the Federal statute was

to deny that the judgment pleaded was *res judicata* so far as it decided any question under the statute; but to deny that the state court had "jurisdiction to entertain an action under section 7 of the federal anti-trust act" would have been irrelevant unless the judgment pleaded had been alleged to be in an action brought under section 7. We submit therefore that the emendation of the reply given at page 5, however ingenious, can not be accepted, first, because it is purely argumentative and, second, because making the suggested change in the reply would have destroyed the reply as a pleading so far as the change extended.

B.

The argument in Point II (pp. 6-24) of the reply brief relates to the fundamental question of jurisdiction. The defendants' position stated in their principal brief (pp. 13-22) was an amplification of Point IV (pp. 20, 21) of their brief on the motion to dismiss. The question was dealt with by the plaintiffs in Point II (pp. 21-26) of their brief on the motion and Point I (pp. 28-36) of their principal brief. The filing of eighteen pages of new argument and authorities not before cited would seem to make it proper for us to submit an answering brief.

Learned counsel now expressly concede that the operation of all the sections of the Sherman Act, except the first, is confined to the Federal courts. Their language is as follows (page 6):

"(2) Congress, while excluding State Courts from entertaining, and both States

and individuals from maintaining in any court, direct proceedings to enforce the public remedies under the act, and while confining (we shall assume) to federal courts the action for three-fold damages allowed by Section 7, did not intend to exclude State Courts (otherwise of competent jurisdiction) from entertaining at the suit of an individual, especially damaged, an action in equity for injunctive relief and damages against a combination to restrain interstate commerce in which the plaintiff relies on the first section of the act to show the unlawful and criminal character of the combination."

It follows, we think, from this concession that no right, title, privilege or immunity was given to the plaintiffs under the Sherman Act. When Congress declared certain contracts unlawful there was created a defense to actions upon such a contract which was available in every court to any party to the contract, but Congress did not thereby give a right of action to persons who were not parties to the contract. Whether the parties to an unlawful contract are liable at the suit of third persons remained in state courts, as it had always been, a question of general law and not of Federal statutory right.

Counsel say (page 7):

"Assuming that a combination to restrain interstate commerce, such as has been proved in this case was not, prior to the act, subject to an action by a stranger to it, however specially damaged; that such a combination was then illegal only in the sense of being unenforceable *inter se*, as soon as a statute

was passed making it criminally unlawful any person specially damaged obtained a right (in the absence of some prohibitory provision) to maintain an action against the combination."

Any person damaged obtained a right to maintain an action against the combination in a Circuit Court of the United States, because the statute expressly gave it, but he obtained no right to maintain an action in a state court because the statute gave no such right; but left the right of maintaining such an action to be decided by the general law, of which the state courts are as to the suits before them the sole interpreters.

Penn. R. R. Co. v. Hughes, 191 U. S., 477, 486.

C.

We do not discuss the removal cases cited by the learned counsel (pp. 8-10) because we do not see their application to the suit at bar. We have not contended that the New York courts did not have jurisdiction of the suit at bar, nor that Federal questions may not be raised in suits within the ordinary jurisdiction of state courts.

It is said at page 10, that:

"the *federal question*, that is the controversy over the effect of the federal anti-trust law upon the extent of copyright privilege, was injected into this case when the defendants filed their answers * * *."

Plainly, then, the Federal question now relied on was not in the case at the time that the Court

of Appeals made its first decision sustaining the demurrer to the complaint (177 N. Y., 473). It follows that when the case next came before the Appellate Division (127 App. Div., 935) and the Court of Appeals (193 N. Y., 496), there would have been two grounds for asking that the former decision be changed—first, that the decision in *Bobbs Merrill Co. v. Straus* (210 U. S., 339), had shown that the former decision of the Court of Appeals was erroneous, and, second, *that since the former decision a new Federal question involving the Sherman Act had been injected into the case when the defendants filed their answers.* But if such a new point had been raised, surely there would have been some reference to it in the history of the appeals given by counsel (our principal brief, pp. 346). It appears from the five opinions delivered in the Appellate Division and the Court of Appeals that all the judges in both courts regarded the question before them as being precisely the same as the question decided upon the first appeal and this excludes the idea that any question was presented to either court which had been injected into the case when the defendants filed their answer.

We submit that the statement at page 10 is mere after-thought not sustained by the record, and that it serves to show even more clearly than before that the present contention of the plaintiffs in error was never made or intended by them to be made in the state courts.

D.

The distinction between the case at bar and *Cook v. Whipple* (55 N. Y., 150), *Kidder v. Horro*

bin (72 N. Y., 159) and *Clafin v. Houseman* (93 U. S., 130) cited by plaintiffs has been clearly set forth by the learned counsel. Of these last mentioned three cases they say (Reply Brief, p. 11):

"It was fully recognized in these cases, that the right upon which the actions were based was derived entirely from the federal statute which related to a subject, namely bankruptcy, within the exclusive jurisdiction of the Federal Government."

Of the case at bar they say (Points in opposition motion to dismiss, p. 1):

"The plaintiffs brought this action in the Supreme Court of the State of New York not under any statute, but in equity under the general law of the State, to restrain an unlawful combination and conspiracy against them by defendants, by which the plaintiffs had been greatly damaged, and also to recover the damages sustained."

We have not argued that Congress had no power to make all the rights of action created by the Sherman Act enforceable by state courts, but only that Congress did not do so. As this is now conceded us to all the sections which give or create remedies or rights of action we do not discuss the matter further.

E.

The claim made by the plaintiffs in their Reply Brief, 2 (a) (p. 12), appears for the first time and it is difficult to deal thoroughly with a question raised in the fifth brief of the series. Sole juris-

diction over interstate commerce is given to Congress by the Constitution. State laws have no effect upon interstate commerce except by consent of Congress which is temporary and is withdrawn whenever Congress enacts similar legislation. (*United States v. Adair*, 152 F., 737, 746-750; *Kelley v. G. Northern R. Co.*, 152 F., 211, 219-226.)

Even if Congress had not passed the Sherman Act, a law by a state legislature regulating or prohibiting monopolies in interstate commerce would have been invalid. (*Escanaba & Co. v. Chicago*, 107 U. S., 678, at p. 687; *Welton v. Mo.*, 91 U. S., 275, at p. 282; *Henderson v. Mayor of New York*, 92 U. S., 259, at p. 272; *Miss. Pac. Ry. v. Larabee Mills*, 211 U. S., 612, 625.)

Congress has acted by passing a statute which covers the whole subject of monopolies in interstate commerce and provides remedies, criminal and civil, which it is conceded can only be administered by the Federal courts. The statute is plenary and therefore it supersedes the state law and policy. (*Chic., R. I. & P. Ry. Co. v. Hardwick El. Co.*, 226 U. S., 426, 435; *Adams Ex. Co. v. Croninger*, Id., 491; *C. B. & Q. Ry. v. Miller*, Id., 513; *Dewberry v. So. Ry. Co.*, 175 F., 307.)

By Section 4, the several Circuit Courts of the United States are invested with jurisdiction to prevent and restrain violation of the act; but this is the very thing which it is claimed that the state court should have done in the case at bar. A state court has no authority to give relief in the premises from which it has been excluded. And no state court has ever given relief for a violation of the Federal anti-trust act.

What is said at page 14 about enforcing in state courts rights of action created by Federal legislation, has no application because Congress has limited to the Federal courts the enforcement of all rights of action created by the Sherman Act.

In *Biglow v. Calumet & Hecla Mining Co.*, 155 F., 869, cited by plaintiffs (p. 15), the United States Circuit Court granted a temporary injunction to an individual suing for a violation of the Sherman Act, but that case is not an authority as to the jurisdiction of state courts under the Sherman Act.

F.

At page 22, counsel argue that our claims in our principal brief (First Point *c* and *d*, pp. 13, 18, 22) even if otherwise good, are too late. We understand the rule to be that a claim of right is never too late if judgment be entered in accordance with it.

Counsel say that the objections that the complaint is "multifarious and insufficient to state a cause of action under the Sherman Act" should have been raised by demurrer to the complaint or by answer "otherwise they must be deemed to have been waived (N. Y. Code Civ. Proc., Sec. 499)."

We cite this section of the Code, italicising a clause which must have escaped the attention of counsel.

"Sec. 499. Objection when deemed waived.

If such an objection is not taken, either by demurrer or answer the defendant is deemed to have waived it: *except* the objec-

tion to the jurisdiction of the Court, or *the objection that the complaint does not state facts sufficient to constitute a cause of action.*"

This objection therefore was not waived but was and is available to sustain the judgment.

As no cause of action under the Sherman Act was well pleaded, demurrer on the ground of misjoinder of causes of action was not in our opinion a proper remedy. The references to the Sherman Act in the complaint were surplusage and as such to be disregarded by the court at all stages of the action (*Locker v. Am. Tobacco Co.*, 121 App. Div., 443, 449). The trial judge refused to find the proposed conclusions of law which held the agreement invalid under the Sherman Act. He could do this on the ground set forth in our principal brief, pp. 18, 19, either of his own accord or upon our motion. In either case the objection that the Donnelly Act and the Sherman Act could not be applied to the same subject matter was available. Even if this point should have been taken by demurrer or answer (which we do not admit) the fault was cured by Sections 721 and 722 of the N. Y. Code of Civil Procedure of which the relevant portion is as follows:

"Sec. 721. Defects cured by verdict and by judgment.

In a court of record where a verdict, report or decision has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be impaired or affected by reason of either of the following imperfections, omissions, defects, matters or

things, in the process, pleadings or other proceedings * * *

5. For a mispleading, insufficient pleading or jeofail * * *

Sec. 722. Such defects to be supplied.

Each of the omissions, imperfections, defects and variances, specified in the last section, and of any other like nature, not being against the right and justice of the matter, and not altering the issue between the parties, or the trial, must, when necessary, be supplied, and the proceeding amended, by the court wherein the judgment is rendered or by an appellate court."

At page 23, counsel say of the complaint:

"The allegations were quite sufficient under the law of New York to admit, especially *in the absence of any objection*, the proof embodied in the findings of fact of the trial court."

As the record does not contain the evidence it is difficult to see upon what the italicised statement rests.

Counsel say (p. 23):

"if the complaint was insufficient, no objection to the variance appears to have been made at the trial."

As the record does not show the proceedings at the trial how could such an objection appear?

Counsel continue (p. 24):

"Defendants have not appealed, and they cannot take such an objection now. If it had been at the trial any necessary amendment could then have been allowed."

Why should we appeal? We make no objection to the judgment.

We seek to affirm it. Any ground upon which the judgment could properly have been granted will now serve to sustain it. In *Brady v. Nally* and *B. & A. R. R. Co. v. O'Reilly*, cited by the plaintiffs in error, this rule was applied, and these cases help us—not our opponents.

The argument of the plaintiffs in error illustrates the unreality of their position. Here is a case, which for a period of nearly eight years was actively litigated in the New York courts and received the attention of more than a score of judges who wrote seventeen opinions. It is not possible to show from the opinions that the question assigned as error was ever considered by any of the judges, and it was not the question which the plaintiffs in error intended to present to the state appellate courts. The alleged error is not in what the state court did, but in what it is supposed to have done "by necessary intendment from its judgment." (Reply brief, p. 21). To show that this intendment was necessary and to exclude other intendments, counsel invite this Court to pass upon moot questions of pleading and practice under the New York Code of Civil Procedure, and their argument requires an incorrect statement of Section 499 of the Code and references to what took place upon the trial which are in no way supported by the record.

Respectfully submitted,

JOHN G. MILBURN,

STEPHEN H. OLIN,

Of Counsel,